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5-95-900
Supr. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 99

ILLINOIS STEEL COMPANY, PETITIONER,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT

PETITION FOR CERTIORARI FILED JUNE 11, 1943.

CERTIORARI GRANTED OCTOBER 11, 1943.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Proceedings in Appellate Court of Illinois, First District	1	1
Appellant's abstract of record from Superior Court of Cook County	1	1
Amended complaint	2	1
Exhibit "A"—Statement showing date cars shipped, initial and number, weight, proper rate, proper charges, amount paid by defendant, balance due	4	3
Answer to amended complaint	7	6
Stipulation of facts	14	11
Judgment order	22	17
Notice of appeal	24	18
Caption	25	19
Orders extending time for filing briefs	28	20
Order of submission	31	21
Opinion, Burke, J.	32	22
Judgment	47	35
Order allowing petition for rehearing	49	36
Order allowing motion for leave to file opinion of United States District Court in case of Chicago Great Western Ry. Co. vs. Hopkins, et al.	50	37
Order allowing motion by appellant for leave to file suggestions re opinion of U. S. District Court in case of C. G. W. Ry. Co. vs. Hopkins	51	37

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1943.

—8616

	Original	Print
Opinion, Burke, J., on rehearing	52	38
Judgment on rehearing	73	57
Order for publication of decision	75	57
Order staying issuance of mandate	76	58
Certificate as to amount involved	77	58
Order staying issuance of mandate	79	59
Order of Supreme Court of Illinois denying leave to appeal	80	60
Clerk's certificate	81	61
Order allowing certiorari	82	62

[fol. 1]

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FEBRUARY TERM, 1942

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Defendant

Appeal from Superior Court, Cook County

Honorable Francis B. Allegretti, Judge Presiding

Abstract of Record—Filed January 13, 1942

Placita.

Complaint. (Afterwards amended.)

Summons and return.

Appearance of Knapp, Beye, Allen, Cochran & Cushing, Attorneys for defendant, filed February 13, 1934.

Notice to defendant of motion by plaintiff for order for leave to file Amended Complaint filed February 28, 1934.

Order dated February 28, 1934, giving leave to plaintiff to file Amended Complaint instanter and rule on defendant to answer within 20 days.

Amended Complaint at law filed February 28, 1934, omitting caption, as follows:

[fol. 2] AMENDED COMPLAINT

The Baltimore and Ohio Railroad Company, a corporation, plaintiff, by H. D. Sheean and E. W. Lademann, its attorneys, leave of court having been first had, files this its Amended Complaint, complaining of the Illinois Steel Company, defendant, and alleges:

1. That the plaintiff is a common carrier by railroad operating a line of railroad through the various states of the United States, and in particular from Chicago, Illinois, eastward to Baltimore, Maryland:

2. That as such common carrier it has published and filed with the Interstate Commerce Commission its classifi-

cation, rates and tariffs for the transportation of goods over its line of railroad.

3. That the defendant corporation has a steel mill located at Gary, Indiana, from which point it makes large shipments of ammonia sulphate.

4. That on various dates between August 9th, 1929 and February 18, 1931, it made a large number of shipments of ammonia sulphate from Gary, Indiana, to Baltimore, Maryland.

5. That the various dates on which the shipments were made appear on the statement attached hereto marked "Exhibit A" and made a part hereof.

6. That said shipments were loaded in cars at the plant of the defendant company at Gary, Indiana, and delivered to the Elgin, Joliet & Eastern Railway Company, which railway company delivered said cars to the plaintiff herein to complete the transportation to Baltimore, Maryland.

[fol. 3] 7. That the defendant prepaid the sum of Twenty-one thousand, two hundred fifty-two Dollars and thirty-seven cents ($21,252.37), being a portion of the lawful charges for transporting said shipments from Gary, Indiana, to Baltimore, Maryland, to the Elgin, Joliet & Eastern Railway Company, but has refused and still refuses to pay the full lawful charges amounting to Twenty-nine thousand, two hundred twenty Dollars and eighty-one cents ($29,220.81), as more fully appears from said "Exhibit A"; which exhibit also shows the date of shipment, the waybill number, initial of car and number, the weight of the shipment, the proper lawful rate, the proper lawful charges, the amounts paid by the defendant and the balance still due on each shipment; wherefore there is due this plaintiff from the defendant the sum of Seven thousand, nine hundred sixty-eight Dollars and forty-four cents ($7,968.44).

8. Wherefore, the plaintiff demands judgment against the defendant in the sum of Ten Thousand Dollars ($10,000.00).

H. D. Sheean & E. W. Lademann, Attorneys for Plaintiff, 315 Grand Central Station, Chicago, Illinois.

[fol. 4] EXHIBIT "A" TO AMENDED COMPLAINT.

SHIPMENTS OF SULPHATE OF AMMONIA FROM GARY, IND., AND JOLIET, ILL., SHIPPED BY ILLINOIS STEEL COMPANY.

Waybill Date	Waybill Number	Car Int. and Number	Weight	Proper Lawful Rate	Proper Lawful Charge	Amounts Paid by Defendant	Balance Due
8/ 9/29	1984	HV-34440	77,660	38.5	$228.99	$217.45	$81.54
	1985	B&O-268031	88,120	38.5	339.26	246.74	92.52
	1986	DH-51333	80,320	38.5	309.23	224.90	84.33
	1987	CMStP-709048	76,360	38.5	293.99	213.81	80.18
8/10/29	2189	B&O-503978	80,740	38.5	310.85	226.07	84.78
	2190	GN-31455	82,720	38.5	318.47	231.62	86.85
	2191	Q-95429	80,400	38.5	309.54	224.12	84.42
	2192	PC Co. 37176	82,200	38.5	316.47	230.16	86.31
	2193	EJE-7341	77,380	38.5	297.91	216.66	81.25
	2194	7626	81,680	38.5	314.47	228.70	85.77
	2195	7491	78,440	38.5	301.99	219.63	82.36
	2244	NYC-150952	86,540	38.5	333.18	242 31	90.87
	2245	NYCStL-16216	77,810	38.5	299.57	218.06	81.51
10/31/30	2983	CNW-110236	82,200	38.5	316.47	230.16	86.31
	2987	StP-708539	81,320	38.5	313.08	227.70	85.38
	2991	CNW-127248	82,100	38.5	316.09	229.88	86.21
	2988	48150	81,000	38.5	311.85	226.80	85.05
	2989	145352	79,920	38.5	307.69	223.78	83.91
	2992	Q-25200	98,900	38.5	380.77	276.92	103.85
	2994	STP-702368	77,940	38.5	300.07	218.23	81.84
	2990	EJE-60054	101,460	38.5	390.62	284.09	106.53
	2985	GN-34778	81,420	38.5	313.47	227.98	85.49
	2986	SLine-134466	83,580	38.5	321.78	234.02	87.76
	2984	CGW-27570	83,420	38.5	321.17	233.58	87.59
	2993	EJE-7337	77,340	38.5	297.76	216.55	81.21
10/30/30	2864	7386	80,300	38.5	309.16	224.84	84.32
	2868	StP-711283	78,340	38.5	301.61	219.35	82.26
	2871	CRIP-154501	79,860	38.5	307.46	223.61	83.85
	2867	CStP-505394	82,460	38.5	317.47	230.89	86.58
	2873	StLFS-161303	81,860	38.5	315.61	229.21	86.40
	2866	NP-47025	82,320	38.5	316.93	230.50	86.43
	2871	OSL-138242	104,940	38.5	404.02	293.83	110.19
	2870	CNW-37948	80,020	38.5	308.08	224.06	84.02
	2872	NP-39351	81,102	38.5	312.31	227.14	85.17
	2863	ATSF-119051	84,020	38.5	323.48	236.26	87.22
	2869	RI-140657	100,100	38.5	385.39	280.28	105.11
	2865	Q-132876	81,080	38.5	312.16	227.02	85.14
2/10/31	846	EJE-7705	80,080	38.5	308.31	224.22	84.09
2/ 5/31	362	60284	99,720	38.5	383.92	279.22	104.70
	358	60289	102,100	38.5	393.09	285.88	107.21
	365	7703	79,520	38.5	306.15	222.66	83.49
	360	7309	81,620	38.5	314.24	228.54	85.70
	363	60309	90,540	38.5	348.38	253.51	95.07
	366	7615	81,400	38.5	313.39	227.92	85.47
	364	80216	89,840	38.5	345.88	251.55	94.33
	361	7554	81,760	38.5	314.78	228.93	85.85
	356	60285	92,700	38.5	356.90	259.56	97.34
	359	60316	102,200	38.5	393.47	286.16	107.31
	357	60376	101,000	38.5	388.85	282.80	106.05
[fol. 5]							
2/18/31	1801	CMStP-708400	71,620	38.5	$275.74	$200.54	$75.20
	1804	EJE-60300	87,700	38.5	337.65	245.56	92.09
	1791	CMStP-713207	87,100	38.5	335.34	243.88	91.46
	1798	CCC-56624	70,520	38.5	271.50	197.46	74.04
1/24/31	2334	EJE-7698	79,460	38.5	305.92	222.49	83.43
	2335	7632	77,400	38.5	297.99	216.72	81.27

EXHIBIT "A" TO AMENDED COMPLAINT—Continued

SHIPMENTS OF SULPHATE OF AMMONIA FROM GARY, IND., AND JOLIET, ILL., SHIPPED BY ILLINOIS STEEL COMPANY.

Waybill Date	Waybill Number	Car Int. and Number	Weight	Proper Lawful Rate	Proper Lawful Charge	Amounts Paid by Defendant	Balance Due
	2336	60153	77,940	38.5	$300.07	$218.23	$81.84
	2337	60136	81,060	38.5	312.08	226.97	85.11
	2338	60312	100,140	38.5	385.54	280.39	105.15
	2339	60371	103,200	38.5	397.32	288.96	108.36
	2340	7379	74,980	38.5	288.67	209.94	78.73
	2341	60237	79,300	38.5	305.31	222.04	83.27
	2342	CMStP-711622	85,980	38.5	331.02	240.74	90.28
	2343	503265	89,200	38.5	343.42	249.76	93.66
	2344	RI-140100	80,420	38.5	309.62	225.18	84.44
	2345	CNW-146714	82,540	38.5	317.78	231.11	86.67
2/18/31	1800	NP-27724	78,100	38.5	300.69	218.68	82.01
	1802	CMStP-711934	71,960	38.5	277.05	201.49	75.56
	1794	Q-98637	81,980	38.5	315.62	229.54	86.08
	1795	PRR-565846	85,000	38.5	327.25	238.00	98.25
	1792	CNW-100752	83,920	38.5	323.09	234.98	88.11
	1797	NP-94356	80,860	38.5	311.31	226.41	84.90
	1793	MC-64963	83,020	38.5	319.63	232.46	87.17
	1803	EJE-7476	89,820	38.5	345.81	251.50	94.31
	1799	E-75584	74,520	38.5	286.90	208.66	78.24
2/13/31	1287	NStL-24222	81,580	38.5	275.58	200.42	75.16
	1283	BAR-10113	82,220	38.5	316.55	230.22	86.33
	1284	CN-76924	74,160	38.5	285.52	207.65	77.87
	1286	CNW-101534	76,560	38.5	294.76	214.37	80.39
	1288	EJE-60163	76,320	38.5	293.83	213.70	80.13
	1285	EJE-7364	70,640	38.5	271.96	197.79	74.17
2/11/31	968	NYC-259611	87,500	38.5	336.88	245.00	91.88
	1022	EJE-7311	72,700	38.5	279.90	203.56	76.34
	1023	NP-29932	76,000	38.5	292.60	212.80	79.80
	1024	GN-13947	74,300	38.5	286.06	208.04	78.02
	967	PLE-33153	81,580	38.5	314.08	228.42	85.66
	964	MC-63460	83,840	38.5	322.78	234.76	88.03
	965	EJE-7774	80,040	38.5	308.15	224.11	84.04
	966	7376	82,080	38.5	316.01	229.82	86.19
	963	NYC-259479	84,320	38.5	324.63	236.10	88.53
	969	52199	116,000	38.5	446.60	324.80	121.80
2/10	845	EJE-7350	82,240	38.5	316.62	230.27	86.35
			7,589,672		$29,220.81	$21,252.37	$7,968.44

[fol. 6] Stipulation to extend time of defendant to file answer dated March 19, 1934.

Order extending time of defendant to file answer 30 days entered March 19, 1934.

Stipulation to extend time of defendant to file answer dated April 18, 1934.

Order extending time of defendant to file answer 30 days entered April 18, 1934.

Stipulation to extend time of defendant to file answer dated May 18, 1934.

Order extending time of defendant to file answer 30 days entered May 18, 1934.

Stipulation to extend time of defendant to file answer dated June 15, 1934.

Order extending time of defendant to file answer 30 days entered June 15, 1934.

Stipulation to extend time of defendant to file answer dated July 13, 1934.

Order extending time of defendant to file answer 60 days entered July 13, 1934.

Stipulation to extend time of defendant to file answer dated September 10, 1934.

Order extending time of defendant to file answer 60 days entered September 11, 1934.

Stipulation to extend time of defendant to file answer dated November 7, 1934.

Order extending time of defendant to file answer 60 days entered November 8, 1934.

[fol. 7] Stipulation to extend time of defendant to file answer dated January 4, 1935.

Order extending time of defendant to file answer 60 days entered January 4, 1935.

Stipulation to extend time of defendant to file answer dated March 4, 1935.

Order extending time of defendant to file answer 60 days entered March 4, 1935.

Stipulation to extend time of defendant to file answer dated May 1, 1935.

Order extending time of defendant to file answer 60 days entered May 2, 1935.

Stipulation to extend time of defendant to file answer dated June 26, 1935.

Order extending time of defendant to file answer 60 days dated June 28, 1935.

Answer of the defendant to the Amended Complaint of the Plaintiff herein, filed September 24, 1935 (omitting caption), as follows:

ANSWER TO AMENDED COMPLAINT

Illinois Steel Company, defendant, by Knapp, Beye, Allen, Cochran and Cushing, its attorneys, answering the amended complaint of the plaintiff in this action, says:

1. Defendant admits that plaintiff is a common carrier by railroad operating a line of railroad through various states of the United States, and in particular from Chicago, Illinois, eastward to Baltimore, Maryland.

[fol. 8] 2. Defendant admits that plaintiff, as such common carrier, has published and filed with the Interstate Commerce Commission its classifications, rates and tariffs for the transportation of goods over its line of railroad.

3. Defendant admits that it is a corporation and that it has a steel mill located at Gary, Indiana, from which point it makes large shipments of ammonia sulphate.

4. Defendant admits that on various dates between August 9, 1929 and February 18, 1931, it made large shipments of ammonia sulphate from Gary, Indiana, to Baltimore, Maryland.

5. Defendant admits that the various dates on which shipments were made, appear on the statement attached to the amended complaint, and that said statement is marked Exhibit "A", and made a part of said amended complaint.

6. Defendant admits that said shipments were loaded in cars at the plant of the defendant at Gary, Indiana, and delivered to Elgin, Joliet and Eastern Railway Company. Defendant admits that Elgin, Joliet and Eastern Railway Company delivered said cars so loaded to the plaintiff herein to complete the transportation thereof to Baltimore, Maryland.

7. Defendant admits that it prepaid to the Elgin, Joilet and Eastern Railway Company the sum of $21,252.37. Defendant denies that the amount so paid was only a portion of the lawful charges for transporting said shipments from Gary, Indiana, to Baltimore, Maryland. Defendant denies

that it has refused and still refuses to pay the full lawful [fol. 9] charges on said shipments. Defendant denies that the full lawful charges on said shipments amount to $29,220.81. Defendant admits that said Exhibit "A" shows the date of each shipment, the waybill number, initial of car and number, and the weight of the shipment. Defendant denies that said Exhibit "A" shows the proper lawful rate on said shipments or the proper lawful charges. Defendant admits that it paid the amounts shown on said Exhibit "A". Defendant denies that there is any balance due from defendant on any shipment shown on said Exhibit "A". Defendant denies that there is due the plaintiff from the defendant the sum of $7,968.44, or any amount whatsoever.

8. Defendant alleges that the defendant and said Elgin, Joilet and Eastern Railway Company entered into a written contract or bill of lading to provide for the transportation of each of the shipments specified in said Exhibit "A" attached to the amended complaint. Defendant further alleges that under the terms of each of said contracts or bills of lading said Elgin, Joilet and Eastern Railway Company agreed, for the amount specified in said contracts or bills of lading (which amounts are the same as the corresponding amounts under the heading "Amounts Paid by Defendant" in said Exhibit "A"), to be prepaid by the defendant to Elgin, Joilet and Eastern Railway Company at the time of shipment, to transport each of said shipments via the line of railroad of Elgin, Joilet and Eastern Railway Company to Curtis, being a point in the State of Indiana, and there to deliver each of said shipments to the plaintiff for transportation to Curtis Bay, in the City of Baltimore, and State of Maryland, where each of said shipments was to be [fol. 10] delivered to Standard Wholesale Phosphate and Acid Works, Inc.

Defendant further alleges that each of said contracts or bills of lading provided that each of said shipments was for export for loading on vessel sailing from Baltimore, Maryland, on certain dates.

Defendant further alleges that each of said contracts or bills of lading contained the following provisions by the defendant:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

"The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of conditions.)

"Illinois Steel Company

"Per .....

(Signature of consignor.)"

Defendant further alleges that Section 7 of the conditions of each contract or bill of lading entered into between defendant and Elgin, Joliet and Eastern Railway Company to provide for the transportation of said shipments which moved during the year 1929 as specified in said Exhibit "A", is as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, any all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, ex- [fol. 11] cept that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Defendant further alleges that Section 7 of the conditions of each contract or bill of lading entered into between defendant and Elgin, Joliet and Eastern Railway Company to provide for the transportation of the remaining shipments, specified in said Exhibit "A", is as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad

shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. *Provided, that*, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against [fol. 12] him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Defendant further alleges that at the time of making each shipment the said Elgin, Joliet and Eastern Railway Company demanded freight thereon in the amounts set forth under the heading "Amounts Paid by Defendant" in said Exhibit "A", and that the defendant prepaid said amounts

to said Elgin, Joliet and Eastern Railway Company as required by said contracts or bills of lading and that said Elgin, Joliet and Eastern Railway Company transported each of said shipments to Curtis, a point in the State of Indiana, and there delivered each of said shipments to the plaintiff, and the plaintiff received, transported and delivered each of said shipments to Standard Wholesale Phosphate and Acid Works, Inc. at Curtis Bay, in the City of [fol. 13] Baltimore, in the State of Maryland.

Defendant alleges that it has paid all of the lawful charges on said shipments due from defendant to plaintiff, and that under the provisions of each of said contracts or bills of lading it is not liable to the plaintiff for any further charges on any of said shipments.

Defendant further alleges that if plaintiff made delivery of said shipments, or any of them, without collection from the consignee, Standard Wholesale Phosphate and Acid Works, Inc., of any additional charges due or deemed by the plaintiff to be due on said shipments, or any of them, the said plaintiff waived and lost its right to collect any additional charges from the defendant.

9. Defendant alleges that said shipments, and each of them, moved in interstate commerce, and that all of the charges collected or to be collected thereon by the plaintiff were and are subject to the provisions of the Interstate Commerce Act; that at all of the times herein mentioned Section 16 (3) (a) provided as follows:

"All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

And Section 16 (3) (c) provided:

"The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."

[fol. 14] Defendant alleges that all of the shipments delivered to said Elgin, Joliet and Eastern Railway Company by the defendant for transportation during the year 1929 and shown on Exhibit "A", attached to the amended complaint, were delivered by the plaintiff at the destination

specified in said bills of lading more than three years prior to the filing of the amended complaint herein.

Wherefore, the defendant asks that plaintiff's action against defendant be dismissed at plaintiff's cost.

Knapp, Beye, Allen, Cochran & Cushing, 208 South LaSalle Street, Chicago, Illinois, Attorneys for Defendant.

July 19, 1937, notice placing case on trial calendar filed.
April 22, 1941, notice resetting case for trial.

Stipulation of Facts filed April 22, 1941 (omitting caption), follows:

STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that upon the trial of the above entitled cause the following shall be taken as a true statement of the facts, with the same force and effect as if such facts were presented in open court by competent evidence, subject only to the right of either party to object to the immateriality or irrelevancy of any or all of such facts:

[fol. 15] That the plaintiff is a common carrier by railroad operating a line of railroad through various states of the United States, and in particular, from Chicago, Illinois, eastward to Baltimore, Maryland.

That plaintiff, as such common carrier, has published and filed with the Interstate Commerce Commission its classifications, rates and tariffs for the transportation of goods over its line of railroad.

That defendant is a corporation and at all times herein referred to it had a steel mill located at Gary, Indiana, from which point it made large shipments of ammonia sulphate.

That defendant on various dates between August 9, 1929, and February 18, 1931, made large shipments of ammonia sulphate from Gary, Indiana, to Baltimore, Maryland; that the various dates on which the said shipments were made appear on the statement attached to the amended complaint and that said statement is marked Exhibit "A" and made a part of said amended complaint.

That said shipments were loaded in cars at the plant of the defendant at Gary, Indiana, and delivered to Elgin, Joliet and Eastern Railway Company. That Elgin, Joliet

and Eastern Railway Company delivered said cars so loaded to the plaintiff herein to complete the transportation thereof to Baltimore, Maryland.

That the consignee of the shipments, the Standard Wholesale Phosphate & Acids Works, Inc., deals in sulphate of ammonia; that the consignee is not owned or controlled by the defendant (consignor) and that the consignor and con- [fol. 16] signee are entirely separate and distinct corporations; that consignee's plant is located on the waterfront in the Curtis Bay District of Baltimore, Maryland, and includes two buildings built partly into or over the water of Curtis Bay, alongside of which buildings the cars containing the shipments in question were placed on tracks by the plaintiff; that these two buildings are used for storing, mixing and bagging commodities moving in both domestic and export commerce, and branch on to or abut wharves at which steamers are berthed for receiving and discharging cargoes; that the said shipments of sulphate of ammonia arrived in bulk and were unloaded from said cars through doors in the sides of said buildings and dumped into bins; that the said shipments of sulphate of ammonia were later placed in bags and handled through the doors in the ends of the building across short uncovered wharves or aprons and loaded into steamers alongside such wharves and exported.

That the so-called domestic rate on sulphate of ammonia from Gary, Indiana to Baltimore, Md., was published in Jones' Tariff No. I. C. C. 2123 and was 38.5¢ per 100 pounds; that the so-called export rate on sulphate of ammonia from Gary, Indiana, to Baltimore, Md., was published in Agent Jones, Tariff No. I. C. C. 2123 at 28¢ per 100 pounds and said tariff carried the following rule as Item Number 9322:

"The rates named in this tariff, or as same may be amended and designated as 'export rates' will apply only on traffic delivered by the Atlantic Port Terminal carriers to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates and also on traffic delivered to [fol. 17] the party entitled to receive it at the carrier's seaboard stations to which export rates apply which traffic is handled direct from the carrier's stations to steamship

docks and on which required proof of exportation is given (CFA Inf. 8179)."

That the defendant and said Elgin, Joliet and Eastern Railway Company, at the time of making each shipment, entered into a written contract or bill of lading to provide for the transportation of each of the shipments specified in said Exhibit "A", attached to the amended complaint. That each of said contracts or bills of lading provided that each of said shipments was for export, sometimes indicating that the shipment was for loading on vessel sailing from Baltimore, Maryland, on certain specified dates; that each of said contracts or bills of lading, among other things, specified the following:

"Consigned to Standard Wholesale Phosphate & Acid Works, Inc.
Destination—Curtis Bay—Baltimore, State of Maryland.
Route—EJ&E, Curtis, B&O—for export—
Freight rate—Prepaid 28¢ per 100# to Baltimore.
Switching rate—none.
J. L.—destination N. A. 5 for export to Porto Rico. Must go through to coast without transfer on account of liability of damage to contents consisting of sulphate of ammonia for fertilizer purposes."

That each of the Bills of Lading covering the shipments contained the following provision, signed by the defendant by one of its authorized employees:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
[fol. 18] "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions.)
Illinois Steel Company, Per —— —— (Signature of consignor)."

That each of said Bills of Lading contains the following:

"If charges are to be prepaid, write or stamp here 'To be Prepaid.'"

The words "To Be Prepaid" were inserted by the defendant in the space provided at the time of the making of each such Bill of Lading.

That each of said Bills of Lading contains the following:

"Received $ ..... to apply in prepayment of the charges on the property described hereon.

..... Agent of Cashier

Per .....

(The signature here acknowledged only the amount prepaid.)"

That Section 7 of the conditions of each of said Bills of Lading was as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates [fol. 19] and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him. If the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or in the case of a shipment so reconsigned or

diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to whom the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

It is further stipulated and agreed that at the time of making each shipment the said Elgin, Joliet and Eastern Railway Company demanded freight thereon in the amount [fol. 20] set forth under the heading "Amounts Paid By Defendant" in Exhibit "A" of the Amended Complaint herein, and that the defendant prepaid said amounts to said Elgin, Joliet and Eastern Railway as required by said contracts or bills of lading and that said Elgin, Joliet and Eastern Railway Company transported each of said shipments to Curtis, a point in the State of Indiana, and there delivered each of said shipments to the plaintiff, and that the plaintiff received, transported and delivered each of said shipments to Standard Wholesale Phosphate & Acid Works, Inc., at Curtis Bay, in the City of Baltimore in the State of Maryland; and that the plaintiff made delivery of said shipments without collection from the consignee, Standard Wholesale Phosphate & Acid Works, Inc., of any additional charges due or deemed by the plaintiff to be due on said shipments, or any of them.

That said shipments and each of them moved in interstate commerce and that all the charges collected or to be collected thereon by the plaintiff were and are subject to the provisions of the Interstate Commerce Act; that at all of the times herein mentioned Section 16 (3) (a) provided as follows:

"All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

And Section 16 (3) (c) provided:

"The cause of action in respect of a shipment of property shall, for the purpose of this section, be deemed to

accrue upon delivery or tender of delivery thereof by the carrier, and not after."

That all of the shipments delivered to said Elgin, Joliet and Eastern Railway Company by the defendant for transportation prior to February 5, 1931, and shown on Exhibit [fol. 21] "A", attached to the amended complaint, were delivered by the plaintiff at the destination specified in said bills of lading more than three years prior to the filing of the original complaint herein.

That the plaintiff is not entitled to recover the balance of the charges alleged to be due on shipments that were delivered more than three years prior to the institution of this suit.

That the total freight charges at the export rate on the shipments delivered within 3 years prior to the institution of this suit was $9.801.93, which charges the defendant prepaid on said shipments. That the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52.

That if the court shall find that Section 7 of the conditions of the Bills of Lading is not a bar to recovery by plaintiff from the defendant, then plaintiff is entitled to recover the sum of $3,675.52, being the amount due on the shipments delivered to the consignee within three (3) years prior to the institution of this suit; if the court shall find that Section 7 of the conditions of the Bills of Lading is a bar to recovery by the plaintiff from the defendant, then plaintiff is not entitled to recover.

H. D. Sheean & E. W. Lademann, Plaintiff's Attorneys. Knapp, Allen & Cushing, Defendant's Attorneys.

April 22, 1941, Order submitting cause to court on Stipulation of facts and rule on plaintiffs to file brief with the [fol. 22] court in support of its case within 20 days, and that defendant file its brief with the court within 30 days thereafter, and plaintiff file a reply brief with the court within 10 days after defendant filed its brief and cause set for trial before the court on June 24, 1941.

June 24, 1941, Order extending defendant's time to file brief with the court to September 7, 1941, and the plaintiff's reply brief to be filed within 20 days after the brief of de-

fendant is filed and cause set for hearing on September 29, 1941.

September 24, 1941, Order postponing hearing to October 6, 1941.

October 10, 1941, Judgment Order (omitting caption) as follows:

JUDGMENT ORDER

This cause coming on to be heard, and counsel for both parties being present, and said cause having been submitted to the Court upon the written stipulation of facts filed herein, whereby it is agreed that the sole issue to be decided by the Court is: Does the executed "no recourse" clause and Section 7 of the conditions of the uniform interstate bill of lading exempt the consignor (defendant herein), under the facts and circumstances in this case, from liability to the carrier (plaintiff herein) for additional freight charges on the shipments mentioned in the complaint filed herein, where the carrier made delivery of the property shipped to the consignee named in said bills of lading without the collection from the consignee of any additional charges thereafter claimed to be due?

Upon consideration of the pleadings, the written stipulation of facts, briefs and oral argument of counsel for [fol. 23] both parties, and being fully advised in the premises:

The Court hereby finds that the issue submitted by the parties should be decided in the affirmative; that the plaintiff (carrier) delivered each of the shipments to the consignee, Standard Wholesale Phosphate & Acid Works, Inc.; that the defendant (consignor), as to each of the shipments involved prepaid the freight charges at the export rate and signed the "no recourse" clause of the uniform interstate bill of lading; that the provisions of the "no recourse" clause signed by the defendant and Section 7 of the conditions of the said uniform interstate bill of lading contracts constitute a bar to the recovery by the plaintiff from the defendant of any additional charges on said shipments; and that judgment should be entered for the defendant herein.

It Is Therefore Ordered, Adjudged and Decreed that judgment be and it is hereby entered for the defendant, that the plaintiff take nothing by its suit, that the defendant, Illinois Steel Company, go hence without day, and that the

said defendant do have and recover of and from the plaintiff its costs and charges in this behalf expended and have execution therefor.

Enter.

(Signed) Francis B. Allegretti, Judge.

Dated: October —, 1941.

O. K.

E. W. Lademann, Attorney for Plaintiff.

O. K.

Knapp, Allen & Cushing, Attorneys for Defendant.

[fol. 24] NOTICE OF APPEAL

October 30, 1941, Notice of appeal filed by The Baltimore and Ohio Railroad Company, defendant (Appellant) to Appellate Court, First District of Illinois, from the final judgment of Superior Court of Cook County, Illinois, entered in said cause on October 10, 1941, finding the issues in favor of the defendant and against the plaintiff, whereupon it was ordered that defendant do have and recover of the plaintiff its cost of suit. Plaintiff (Appellant) prays that said judgment may be reversed.

October 30, 1941, Notice to attorneys for defendant of filing of aforesaid notice of appeal in office of said Clerk, with receipt thereon, dated October 30, 1941, for copy thereof, signed by said attorneys for defendant, filed.

November 7, 1941, proof of service of copy of praecipe for trial court record, with receipt thereon of attorneys for defendant-appellee, dated November 7, 1941, for copy of said notice and of said praecipe for trial court record, filed.

November 7, 1941, praecipe for trial court record filed by plaintiff-appellant.

November 2, 1941, Report of Proceedings at the trial presented to Court, certified as correct and ordered filed.

Certificate of Clerk dated December 2, 1941.

Fees for transcript, $8.00, paid by E. W. Lademann, Attorney for Appellant.

H. D. Sheean and E. W. Lademann, Attorneys for Appellant.

[fol. 25] RECORD FROM APPELLATE COURT, FIRST DISTRICT, TO SUPREME COURT

Nisi Prius Gen. No. 34 S 1752. Appellate Gen. No. 42145. Supreme Court Gen. No. —

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

[fol. 26] At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the First day of December in the year of our Lord One Thousand Nine Hundred and Forty-two within and for the First District of the State of Illinois.

Present Hon. Joseph Burke, Presiding Justice; Present Hon. Oscar Hebel, Justice; Present Hon. Roger J. Kiley, Justice; Sheldon W. Govier, Clerk; Peter B. Carey, Sheriff.

Court met pursuant to law.

Court opened by proclamation.

No. 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

Be It Remembered, That heretofore on the Second day of December A. D. 1941, it being one of the days of said December Term, A. D. 1941, certain proceedings were had in said Court and entered of record in words and figures following, to-wit:

[fol. 27] At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Second day of December in the year of our Lord One Thousand Nine Hundred and

Forty-one within and for the First District of the State of Illinois.

Present Hon. William H. McSurely, Presiding Justice; Present Hon. David F. Matchett, Justice; Present Hon. John M. O'Connor, Justice; Sheldon W. Govier, Clerk; Thomas J. O'Brien, Sheriff.

Court met pursuant to law.

Court opened by proclamation.

And afterwards, on the 12th day of January A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 28] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

This day came appellant by its counsel and moved the Court to extend the time to and including February 14th A. D. 1942 in which to file its briefs in said cause, as per affidavit and stipulation filed herein, and the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards, on the 16th day of January A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 29] In the Matter of the Assignment of Cases to the Third Division, Appellate Court, First District, Illinois

February Term, A. D. 1942. Calendar

On the Court's own motion it is ordered that the following-numbered cases on the February Term Calendar, A. D. 1942 of said Court be and the same are hereby assigned to the Third Division Appellate Court for hearing and determination, to-wit: 42145. The Baltimore and Ohio Railroad Company, a Corp. vs. Illinois Steel Company, a Corp.

And afterwards, on the 4th day of March, A. D. 1942, it being one of the days of the February Term, A. D. 1942 of said Court, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 30] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

This day came appellee by its counsel and moved the Court to extend the time 30 days from March 16th A. D. 1942 in which to file its briefs in said cause as per affidavit and stipulation filed herein and the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards, on the same day to-wit: the 4th day of March A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 31] 42145

THE BALTIMORE & OHIO RAILROAD CO., a Corp., Appellant,

vs.

ILLINOIS STEEL CO., a Corp., Appellee

Appeal from Cook Superior

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on abstracts and briefs filed by appellant and briefs of appellee due April 15, 1942.

And afterwards, on the 3rd day of July A. D. 1942 it being one of the days of the June Term A. D. 1942 there was filed in the office of the Clerk of said Appellate Court the

written opinion of this Court, which opinion is in the words and figures following, to-wit:

[fol. 32] APPEAL FROM SUPERIOR COURT, COOK COUNTY

42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant

v.

ILLINOIS STEEL COMPANY, A CORPORATION, Appellee

MR. PRESIDING JUSTICE BURKE delivered the opinion of the Court:

In an amended complaint filed in the Superior Court of Cook County on February 28, 1934, plaintiff sought to recover of the defendant a balance of freight charges claimed to be due on a number of shipments of Sulphate of Ammonia, made by defendant as consignor, from its plant at Gary, Indiana to Wholesale Phosphate and Acid Works, Inc., Baltimore, Maryland, as consignee, for export. Plaintiff attached a statement marked "Exhibit A", giving complete data as to each shipment, including the lawful charge, the amount paid by defendant and the balance claimed to be due. Defendant prepaid the freight charges at the export rate and the additional charges are alleged to be due because the export rate was not applicable to the shipments, but that the domestic rate, which is higher than the export rate, was the one applicable under the tariffs of the carriers involved. The case was tried before the court upon a stipulation of facts. The court found the issues in favor of the defendant and entered judgment for costs against the plaintiff. This appeal followed.

The parties stipulated that the plaintiff is a common carrier by railroad operating a line of railroad through various states of the United States, and in particular, from Chicago, Illinois, eastward to Baltimore, Maryland; that the plaintiff, as such common carrier, has published and filed with the Interstate Commerce Commission its classifications, rates and tariffs for the transportation of goods over its line of railroad; that defendant is a corporation and at all [fol. 33] times herein referred to it had a steel mill located at Gary, Indiana, from which point it made large shipments

of ammonia sulphate; that defendant on various dates between August 9, 1929, and February 18, 1931, made large shipments of ammonia sulphate from Gary, Indiana, to Baltimore, Maryland; that the various dates on which the said shipments were made appear on the statement attached to the amended complaint and that said statement is marked Exhibit "A" and made a part of said amended complaint; that said shipments were loaded in cars at the plant of the defendant at Gary, Indiana, and delivered to Elgin, Joliet and Eastern Railway Company; that Elgin, Joliet and Eastern Railway Company delivered said cars so loaded to the plaintiff herein to complete the transportation thereof to Baltimore, Maryland; that the consignee of the shipments, the Standard Wholesale Phosphate & Acid Works, Inc., deals in sulphate of ammonia; that the consignee is not owned or controlled by the defendant (consignor) and that the consignor and consignee are entirely separate and distinct corporations; that consignee's plant is located on the waterfront in the Curtis Bay District of Balimore, Maryland, and includes two buildings built partly into or over the water of Curtis Bay, alongside of which buildings the cars containing the shipments in question were placed on tracks by the plaintiff; that these two buildings are used for storing, mixing and bagging commodities moving in both domestic and export commerce, and branch on to or abut wharves at which steamers are berthed for receiving and discharging cargoes; that the said shipments of sulphate of ammonia arrived in bulk and were unloaded from said cars through doors in the sides of said buildings and dumped into bins; that the said shipments of sulphate of ammonia were later placed in bags and handled through the doors in the ends of the building across short uncovered wharves or aprons and loaded into steamers alongside such wharves and exported; that the so-called domestic rate on sulphate of ammonia from Gary, Indiana to Baltimore, Md., [fol. 34] was published in Jones' Tariff No. I. C. C. 2123 and was 38.5¢ per 100 pounds; that the so-called export rate on sulphate of ammonia from Gary, Indiana, to Baltimore, Md., was published in Agent Jones, Tariff No. I. C. C. 2123 at 28¢ per 100 pounds and said tariff carried the following rule as Item Number 9322:

"The rates named in this tariff, or as same may be amended and designated as 'export rates' will apply only

on traffic delivered by the Atlantic Port Terminal carriers to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply which traffic is handled direct from the carrier's stations to steamship docks and on which required proof of exportation is given (CFA Inf. 8179)."

that the defendant and said Elgin, Joliet and Eastern Railway Company, at the time of making each shipment, entered into a written contract or bill of lading to provide for the transportation of each of the shipments specified in said Exhibit "A", attached to the amended complaint; that each of said contracts or bills of lading provided that each of said shipments was for export, sometimes indicating that the shipment was for loading on vessel sailing from Baltimore, Maryland, on certain specified dates; that each of said contracts or bills of lading, among other things, specified the following:

"Consigned to Standard Wholesale Phosphate & Acid Works, Inc.
Destination—Curtis Bay—Baltimore, State of Maryland.
Route—EJ&E, Curtis, B&O—for export.
Freight rate—Prepaid 28¢ per 100# to Baltimore.
Switching rate—none.
J. L.—destination N. A. 5 for export to Porto Rico. Must go through to coast without transfer on account of liability of damage to contents consisting of sulphate of ammonia for fertilizer purposes."

that each of the Bills of Lading covering the shipments contained the following provision, signed by the defendant by one of its authorized employees:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: the carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)

[fol. 35] Illinois Steel Company, Per —— ——,
(Signature of consignor)."

that each of said Bills of Lading contains the following: "If charges are to be prepaid, write or stamp here 'To be Prepaid'." The words "To be Prepaid" were inserted by the defendant in the space provided at the time of the making of each such Bill of Lading; that each of said Bills of Lading contains the following:

"Received $—— to apply in prepayment of the charges on the property described hereon. —— —— Agent or Cashier, Per —— —— (The signature here acknowledged only the amount prepaid.)"

that section 7 of the conditions of each of said Bills of Lading was as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him. If the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and,

in such cases the shipper or consignor, or in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

[fol. 36] It is further stipulated and agreed that at the time of making each shipment the said Elgin, Joliet and Eastern Railway Company demanded freight thereon in the amount set forth under the heading "Amounts Paid by Defendant" in Exhibit "A" of the Amended Complaint herein, and that the defendant prepaid said amounts to said Elgin, Joliet and Eastern Railway as required by said contracts or bills of lading and that said Elgin, Joliet and Eastern Railway Company transported each of said shipments to Curtis, a point in the State of Indiana, and there delivered each of said shipments to the plaintiff, and that the plaintiff received, transported and delivered each of said shipments to Standard Wholesale Phosphate & Acid Works, Inc., at Curtis Bay, in the City of Baltimore in the State of Maryland; and that the plaintiff made delivery of said shipments without collection from the consignee, Standard Wholesale Phosphate & Acid Works, Inc., of any additional charges due or deemed by the plaintiff to be due on said shipments, or any of them; that said shipments and each of them moved in interstate commerce and that all the charges collected or to be collected thereon by the plaintiff were and are subject to the provisions of the Interstate Commerce Act; that at all of the times herein mentioned Section 16 (3) (a) provided as follows:

"All actions at law by carrier subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

Section 16 (3) (e) provided:

"The cause of action in respect of a shipment of property shall, for the purpose of this section, be deemed to accrue

27

upon delivery or tender of delivery thereof by the carrier, and not after."

that all of the shipments delivered to said Elgin, Joliet and Eastern Railway Company by the defendant for transportation prior to February 5, 1931, and shown on Exhibit "A" attached to the amended complaint, were delivered by the plaintiff at the destination specified in said bills of lading more than three years prior to the filing of the original complaint herein; that the plaintiff is not entitled to recover [fol. 37] the balance of the charges alleged to be due on shipments that were delivered more than three years prior to the institution of this suit; that the total freight charges at the export rate on the shipments delivered within 3 years prior to the institution of this suit was $9,801.93, which charges the defendant prepaid on said shipments; that the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52; that if the court shall find that Section 7 of the conditions of the Bills of Lading is not a bar to recovery by plaintiff from the defendant, then plaintiff is entitled to recover the sum of $3,675.52, being the amount due on the shipments delivered to the consignee within three (3) years prior to the institution of this suit; if the court shall find that Section 7 of the conditions of the Bills of Lading is a bar to recovery by the plaintiff from the defendant, then plaintiff is not entitled to recover.

Plaintiff's theory of the case is that Section 7 of the conditions of the bills of lading can have no application to a prepaid shipment, particularly, under the facts and circumstances in this case, where the carriers, upon being advised that said shipments were for export, demanded payment of their charges in advance on the basis of the export rate, and had no notice or knowledge that said shipments, after delivery to consignee, would be so handled as to make inapplicable the export rate, and make applicable the domestic rate; that under section 7 of the conditions of the bills of lading, the carriers have a right to "require at time of shipment the prepayment or guarantee of the charges" and that the defendant could not deprive the carriers of this right of prepayment by the execution of the stipulation under section 7 of the conditions of the bills of lading. Defendant's theory of the case, as stated by plaintiff, is that having executed the stipulations on the bills of lading re-

ferred to in section 7 of the conditions of the bills of lading, and plaintiff having delivered the shipments contrary to such stipulations, has no recourse against the defendant, [fol. 38] but must look to the consignee for any additional charges.

The shipments of Sulphate of Ammonia were delivered by the defendant as shipper and consignor to the Elgin, Joliet & Eastern Railway at Gary, Indiana, consigned to the Standard Wholesale Phosphate and Acid Works, Inc., Baltimore, Maryland, and transported by that railroad and by plaintiff as terminal carrier. The shipments were made under uniform straight bills of lading in the forms prescribed by the Interstate Commerce Commission. At the time the shipments moved, [and also today], there were two rates applicable to the shipments of this product from Gary to Baltimore, dependent upon whether the shipments were for export or domestic use. The rate on a shipment for export was and is lower than the rate on a shipment for domestic use. On each of the bills of lading issued upon the shipments involved here the defendant signified that the shipment was for export, and that the freight charges thereon were to be prepaid. The defendant prepaid to the Elgin, Joliet & Eastern Railway the freight charges on each shipment from Gary to Baltimore at the export rate. The initial carrier demanded the prepayment of the freight charges in the amount set out in Exhibit A, and defendant prepaid the amounts so demanded. The railroad tariff which published the export rate on Sulphate of Ammonia from Gary to Baltimore carried the following limitation upon the application of that rate:

"The rates named in this tariff, or as same may be amended and designated as 'export rates' will apply only on traffic delivered by the Atlantic Port Terminal carriers to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from the carrier's stations to steamship docks and on which required proof of exportation is given."

The shipments in question upon arrival at Baltimore were not delivered either to the "steamer or steamer's dock" or to the "carrier's seaboard stations", but on the contrary were delivered by the plaintiff upon the consignee's instructions at a building used by the consignee for storing, mixing and bagging commodities moving in both domestic and [fol. 39] export commerce. Since this delivery did not meet the tariff requirement for the application of the rate, plaintiff demanded that the defendant pay the domestic rate on the shipments, and upon defendant's refusal to pay, the instant suit was brought for the difference between the total freight charges on the shipments at the domestic rate and the total freight charges prepaid by the defendant on the shipments at the export rate. The defendant pleaded that certain items were barred by the limitation of Section 16 (3) (a) that "All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after". The stipulation disposed of this defense by providing that the total freight charges at the export rate on the shipments delivered within three years prior to the instant suit were $9,801.93, which the defendant prepaid, and that the total freight charges on the shipments at the domestic rate were $13,477.45, a difference of $3,675.52, and that if the court found that Section 7 of the conditions of the bills of lading was not a mar to recovery by plaintiff, then plaintiff was entitled to recover the sum of $3,675.52.

Each of the bills of lading under which these shipments moved contained the following provision: "If charges are to be prepaid, write or stamp here 'To Be Prepaid'." The words "To Be Prepaid" were inserted by the defendant in the space provided at the time of the making of each bill of lading, and the charges on each shipment were prepaid by the defendant to the initial carrier at the export rate. Each of the bills of lading had this further provision which was signed by the defendant:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)"

The pertinent portion of Section 7 of the conditions of the bills of lading is as follows:

[fol. 40] "Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. * * * Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

The question we are asked to determine is whether the provisions of Section 7 release the defendant from liability for the additional freight charges due on the shipments in the face of defendant's specifications as to each shipment that the freight charges thereon were to be prepaid by the defendant. It will be noted that the shipments actually were exported by the consignee. Plaintiff contends that the method of handling the shipments at destination by the consignee made the export rate inapplicable and resulted in the additional charges. By their stipulation, the parties have eliminated any controversy about the claim of the railroad for the additional charges, apparently recognizing that the shipments were not handled at the point of delivery in Baltimore in such a manner as to entitle them to the export rate. Defendant contends that because of the nonrecourse clause in the bill of lading plaintiff cannot prevail in its attempt to collect the undercharge from it.

Plaintiff contends that the trial court erred in finding the issues for defendant. Defendant asserts that plaintiff

failed to perform its contract by delivering the property without collection of the freight and all other lawful charges, and is not entitled to recovery; that it (defendant) has complied fully with the contract of transportation; and that plaintiff cannot recover in the absence of a showing that defendant has been guilty of a breach of the contract. The [fol. 41] parties are in agreement that the bills of lading including the "no recourse" clause and Section 7 of the conditions of the bills of lading, were valid, lawful, binding and enforceable contracts. Defendant points out that the shipments were transported under uniform straight bills of lading in the form prescribed by the Interstate Commerce Commission. Defendant also urges that there is no inconsistency resulting from the prepayment by the consignor of a portion or all of the charges at the export rate as shown on the face of the uniform bills of lading and the execution by the consignor of the "prepay" and of the "no recourse" clauses of the bills of lading, that the consignor may prepay all or any part of the charges and that the protection of the "no recourse" clause is not limited to "collect" shipments. Finally, defendant insists that the very purpose of the executed "no recourse" clause is to protect the consignor from liability for freight and other charges, including subsequently discovered undercharges, in the event that the carrier, contrary to the provisions of the clause, parts with possession of the property without collecting all charges due the carrier; that if the carrier wishes to hold the consignor liable for the charges, such carrier must retain possession of the property until all the charges due thereon have been paid; and that if the carrier makes delivery of the property without collecting all charges, such carrier can no longer hold the consignor liable, but thereafter must look solely to the consignee for payment of any unpaid charges. The courts have uniformly held that it is the duty of the carrier to collect its lawful charges. In *Davis* v. *Keystone Steel & Wire Co.*, 317 Ill. 278, the court said (288):

"The terms of every contract of shipment, so far as the service to be rendered and the compensation to be received are concerned, are fixed by the schedule filed with and approved by the Interstate Commerce Commission. No agreement of the parties can modify those terms, though expressed in writing and actually performed. The collection by the carrier of less than the schedule rate, though ex-

pressly agreed on, will not prevent the recovery of the shortage from the schedule rate. The rates defined by the tariff cannot be varied or enlarged by either contract or tort by the carrier."

[fol. 42] There is no contention that the defendant committed any fraud. Defendant believed in good faith that the shipments would be exported and the bills of lading bore a notation that they were for export. Plaintiff accepted the charges paid to the initial carrier in accordance with the directions on the bills of lading, and it had no knowledge until the shipments had been delivered to the consignee at Baltimore, that the provisions of the export tariff would not be complied with and that the domestic rate would be the only rate legally applicable to the shipments. In *The Alton Railroad Company* v. *Gillards*, 379 Ill. 308, the court said (313):

"It has been repeatedly held that while the rights and liabilities of shippers as to the rates and amounts of the charges made are governed by the Federal laws relating to interstate commerce, as interpreted by the Federal courts, still the Interstate Commerce act does not purport to determine upon whom the liability to pay transportation charges shall fall. This is a matter of contract in no way controlled by the Interstate Commerce act. • • • The Interstate Commerce act is not concerned with who shall pay the transportation charges. It permits the carrier to make any contract it may see fit with reference to who shall pay the charges. Its only purpose is to prevent discrimination and rebates. It prohibits the application of any act or conduct as estopping a carrier from exacting the lawful freight rate."

Defendant invokes the nonrecourse provision of Section 7 of the conditions of the bills of lading. Plaintiff's position is that Section 7 is limited to "collect" shipments and does not relate to "prepaid" shipments, where the consignor has expressly undertaken to prepay the freight. Defendant contends that there is no inconsistency resulting from the prepayment by the consignor of a portion or all of the charges at the export rate as shown on the face of the bills of lading and the execution by the consignor of the "prepay" and of the "no recourse" clauses, and that the protection of the

"no recourse" clause is not limited to "collect" shipments. Defendant points out that it is a general principle of construction that, if possible, an instrument should be construed as to give effect to all of its provisions, and that in this case it is possible to give effect to both the "prepay" and the "no recourse" clauses because the shipper, in [fol. 43] effect, stated that it had a shipment to Puerto Rico, and wished to prepay the charges to Baltimore; that it asked the carrier how much the charges would be; that on being informed the charges would be 28¢ per 100 pounds to Baltimore the shipper agreed to prepay the amount thus demanded; that to protect itself fro liability for any additional charges which might accrue over and above those which the defendant by its sales contract with the consignee and by its transportation contract with the initial carrier had agreed to pay, the consignor in executing the bill of lading also signed the "no recourse" clause, which meant the carrier could not have recourse upon the consignor if it delivered the property without collecting all of the charges lawfully due.

We have studied the cases cited by the respective parties. These cases are helpful to an understanding of the problem presented, but none passes on the proposition. It will be observed that Section 7 of the conditions of the bills of lading provides that "nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped." The first part of this section makes the consignor primarily liable for the freight and all other lawful charges. It then provides that if the consignor signs the stipulation and the carrier makes delivery without requiring the payment of such charges, the consignor shall not be liable for such charges. It is clear that the words "such charges" mean the freight and all other lawful charges. We agree with plaintiff that "such charges" having been prepaid, the "no recourse" clause does not apply. This is particularly true when we consider the last two sentences of the section which provide that "nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges" and that "if upon inspection it is [fol. 44] ascertained that the articles shipped are not those

described in this bill of lading, the freight charges must be paid upon the articles actually shipped." The bills of lading required that if the charges were to be prepaid, the words "To be Prepaid" were to be written or stamped thereon. The words "To be Prepaid" were inserted by the defendant at the time of the making of each bill of lading. The initial carrier required the defendant to prepay the charges. In our opinion the charges which the defendant agreed to prepay were whatever charges were applicable to the commodity. We are also of the opinion that the "no recourse" clause is not applicable to the situation covered by the stipulation. Furthermore, the initial carrier required defendant to prepay the charges, as it had a right to do. Referring to the clause that "if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped", plaintiff contends that defendant described the goods as being for export, when in fact they were domestic goods under the carrier's tariff, and that the change in character did not reveal itself until the goods had been delivered to the consignee and could not possibly have been known to plaintiff until the delivery had been made. We agree that this is not a case of mis-description. While it is true that the commodity shipped was described as Sulphate of Ammonia and that Sulphate of Ammonia was shipped, the export rate was applied on the assumption that the handling of each shipment would be in accordance with the tariff regulation. Plaintiff had no control over the handling of each shipment after it was delivered to the consignee at Baltimore. Defendant, in selling its product, had the opportunity to contract with the purchaser so as to protect itself by requiring that each shipment be handled so that the export rate would be applicable. Defendant states that it prepaid the charges on the shipment at the export rate and that it had no way of knowing what might happen to the shipment after delivery at Baltimore. Plaintiff points out that if the defendant [fol. 45] did not know what the consignee might do with the shipment, how was it (plaintiff) to know? The shipping instructions from the defendant directed that delivery be made to the Wholesale Phosphate and Acid Works, Inc., Curtis Bay, Baltimore, Maryland, for export. These instructions were carried out and delivery made as directed. There were no additional charges due up to the time of de-

livery. We agree with plaintiff that it would be unreasonable to expect that plaintiff should have anticipated that the consignee might not comply with the export tariff and should have withheld delivery, although the freight charges had been paid. Plaintiff required the payment of its charges at the time of shipment. At that time the defendant designated the shipment as for export. A subsequent examination revealed that the export rate was not applicable. We are of the opinion that the nonrecourse clause of the conditions of the bills of lading was not applicable to the shipments under discussion, and that plaintiff is entitled to recover the difference between the domestic rate and the export rate on the shipments delivered within three years prior to the institution of the suit, or $3,675.52. Therefore, the judgment of the Superior Court of Cook County is reversed and the cause remanded with directions to enter a judgment for the plaintiff and against defendant in the sum of $3,675.52 and costs.

Reversed and Remanded With Directions.

Hebel and Killey, JJ. Concur.

[fol. 46] And afterwards, on the same day to-wit: the 3rd day of July A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 47] No. 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment aforesaid, there is manifest

error: Therefore, it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the Judgment of the Superior Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to said Superior Court to enter a judgment for the plaintiff and against defendant in the sum of $3,675.52 and costs. And it is further considered by the Court that the said Appellant recover of and from the said Appellee its costs, by it in this behalf expended to be taxed, and that it have execution therefor.

[fol. 48] And afterwards, on the 18th day of September A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 49] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

The Court having considered the petition of Appellee praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be and the same is hereby allowed.

It is further ordered by the Court that the order and Judgment heretofore entered herein in said cause on the 3rd day of July A. D. 1942, be and the same is hereby vacated and set aside.

And afterwards, on the 25th day of November A. D. 1942, it being one of the days of the October Term A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 50] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

This day came Appellee by its counsel and moved the Court for leave to file a certified copy of the opinion in the case of Chicago Great Western Railway Company vs. Harry A. Hopkins, et al., by the United States District Court for the District of Minnesota, Fourth Division, No. 497 Civil, rendered November 10, 1942, instanter and that same be considered with the petition for rehearing heretofore filed herein in said cause by the Appellee as per reasons and affidavit filed herein, and the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards, on the 2nd day of December A. D. 1942, it being one of the days of the December Term A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 51] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

This day came Appellant by its counsel and moved the Court for leave to file instanter suggestions in connection with the opinion of the United States District Court of the Northern District of Minnesota, in the case of Chicago Great Western Railway Company vs. Hopkins, heretofore filed herein in said cause by Appellee, as per suggestions and affidavit filed herein, and the Court being fully ad-

vised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards, on the 9th day of December A. D. 1942, there was filed in the office of the Clerk of said Appellate Court the written opinion of this Court, which opinion is in the words and figures following, to-wit:

[fol. 52] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, Appellant

v.

ILLINOIS STEEL COMPANY, a corporation, Appellee

Appeal from Superior Court Cook County

On rehearing

Mr. Presiding Justice Burke delivered the opinion of the court.

In an amended complaint filed in the Superior Court of Cook County on February 28, 1934, plaintiff sought to recover of the defendant a balance of freight charges claimed to be due on a number of shipments of Sulphate of Ammonia, made by defendant as consignor from its plant at Gary, Indiana to Wholesale Phosphate and Acid Works, Inc., Baltimore, Maryland, as consignee, for export. Plaintiff attached a statement marked Exhibit "A", giving complete data as to each shipment, including the lawful charge, the amount paid by defendant and the balance claimed to be due. Defendant prepaid the freight charges at the export rate and the additional charges are alleged to be due because the export rate was not applicable to the shipments, but that the domestic rate, which is higher than the export rate, was the one applicable under the tariffs of the carriers involved. The case was tried before the court upon a stipulation of facts. The court found the issues in favor of the defendant and entered judgment for costs against the plaintiff. This appeal followed.

The parties stipulated that the plaintiff is a common carrier by railroad operating a line of railroads through var-

ious states of the United States, and in particular, from Chicago, Illinois eastward to Baltimore, Maryland; that the plaintiff, as such common carrier, has published and [fol. 53] filed with the Interstate Commerce Commission its classifications, rates and tariffs for the transportation of goods over its line of railroad; that defendant is a corporation and at all times herein referred to it had a steel mill located at Gary, Indiana, from which point it made large shipments of ammonia sulphate; that defendant on various dates between August 9, 1929 and February 18, 1931 made large shipments of ammonia sulphate from Gary, Indiana to Baltimore, Maryland; that the various dates on which the said shipments were made appear on the statement attached to the amended complaint and that said statement is marked Exhibit "A" and made a part of said amended complaint; that said shipments were loaded in cars at the plant of the defendant at Gary, Indiana and delivered to Elgin, Joliet and Eastern Railway Company; that the Elgin, Joliet and Eastern Railway Company delivered said cars so loaded to the plaintiff herein to complete the transportation thereof to Baltimore, Maryland; that the consignee of the shipments, the Standard Wholesale Phosphate & Acid Works, Inc., deals in sulphate of ammonia; that the consignee is not owned or controlled by the defendant (consignor) and that the consignor and consignee are entirely separate and distinct corporations; that consignee's plant is located on the waterfront in the Curtis Bay District of Baltimore, Maryland, and includes two buildings built partly into or over the water of Curtis Bay, alongside of which buildings the cars containing the shipments in question were placed on tracks by the plaintiff; that these two buildings are used for storing, mixing and bagging commodities moving in both domestic and export commerce, and branch on to or abut wharves at which steamers are berthed for receiving and discharging cargoes; that the said shipments of sulphate of ammonia arrived in bulk and were unloaded from said cars through doors in the sides of said buildings and dumped into bins; that the said shipments of sulphate of ammonia were later placed in bags [fol.54] and handled through the doors in the ends of the building across short uncovered wharves or aprons and loaded into steamers alongside such wharves and exported; that the so-called domestic rate on sulphate of ammonia from Gary, Indiana to Baltimore, Maryland was published

in Jones' Tariff No. I.C.C.2123 and was 38.5¢ per 100 pounds; that the so-called export rate on sulphate of ammonia from Gary, Indiana to Baltimore, Maryland was published in Agent, Jones, Tariff No. I.C.C. 2123 at 28¢ per 100 pounds, and said tariff carried the following rule as Item Number 9322:

"The rates named in this tariff, or as same may be amended, and designated as 'export rates' will apply only on traffic delivered by the Atlantic Port Terminal carriers to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply which traffic is handled direct from the carrier's stations to steamship docks and on which required proof of exportataion is given (CFA Inf. 8179.)"

that the defendant and said Elgin, Joliet and Eastern Railway Company, at the time of making each shipment, entered into a written contract or bill of lading to provide for the transportation of each of the shipments specified in said Exhibit "A," attached to the amended complaint; that each of said contracts or bills of lading provided that each of said shipments was for export, sometimes indicating that the shipment was for loading on vessel sailing from Baltimore, Maryland on certain specified dates; that each of said contracts or bills of lading, among other things, specified the following:

"Consigned to Standard Wholesale Phosphate & Acid Works, Inc.

"Destination—Curtis Bay—Baltimore, State of Maryland

"Route—EJ&E, Curtis, B&O—for export

"Freight rate—Prepaid 28¢ per 100# to Baltimore

"Switching rate—none

"J. L.—destination N. A. 5 for export to Porto Rico. Must go through to coast without transfer on account of liability of damage to contents consisting of sulphate of ammonia for fertilizer purposes."

that each of the Bills of Lading covering the shipments contained the following provision, signed by the defendant by one of its authorized employees:

[fol. 55] "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: the carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)

"Illinois Steel Company
"Per. —— ——
"Signature of consignor."

that each of said Bills of Lading contains the following: "If charges are to be prepaid, write or stamp here 'To be Prepaid.'" The words "To be Prepaid" were inserted by the defendant in the space provided at the time of the making of each such Bill of Lading; that each of said Bills of lading contains the following:

"Received $—— to apply in prepayment of the charges on the property described hereon. —— —— Agent of Cashier Per. —— —— (The signature here acknowledged only the amount prepaid.)"

that Section 7 of the Conditions of each of said Bills of Lading was as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which

may be found to be due after the property has been delivered to him. If the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped." [fol. 56] It is further stipulated and agreed that at the time of making each shipment the said Elgin, Joliet and Eastern Railway Company demanded freight thereon in the amount set forth under the heading "Amounts Paid By Defendant" in Exhibit "A" of the amended complaint herein, and that the defendants prepaid said amounts to said Elgin, Joliet and Eastern Railway as required by said contracts or bills of lading and that said Elgin, Joliet and Eastern Railway Company transported each of said shipments to Curtis, a point in the State of Indiana, and there delivered each of said shipments to the plaintiff, and that the plaintiff received, transported and delivered each of said shipments to Standard Wholesale Phosphate & Acid Works, Inc., at Curtis Bay, in the City of Baltimore in the State of Maryland; and that the plaintiff made delivery of said shipments without collection from the consignee, Standard Wholesale Phosphate & Acid Works, Inc., of any additional charges due or deemed by the plaintiff to be due on said shipments, or any of them; that said shipments and each of them moved in interstate commerce and that all the charges collected or to be collected thereon by the plaintiff were and are subject to the provisions of the Interstate Commerce Act; that at all of the times herein mentioned Section 16 (3) (a) provided as follows:

"All actions at law by carrier subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

Section 16 (3) (e) provided:

"The cause of action in respect of a shipment of property shall, for the purpose of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."

that all of the shipments delivered to said Elgin, Joliet and Eastern Railway Company by the defendant for transportation prior to February 5, 1931, and shown on Exhibit "A" attached to the amended complaint, were delivered by the plaintiff at the destination specified in said bills of lading more than three years prior to the filing of the original complaint herein; that the plaintiff is not entitled to recover the balance of the charges alleged to be due on shipments [fol. 57] that were delivered more than three years prior to the institution of this suit; that the total freight charges at the export rate on the shipments delivered within three years prior to the institution of this suit was $9,801.93, which charges the defendant prepaid on said shipments; that the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52; that if the court shall find that Section 7 of the Conditions of the Bills of Lading is not a bar to recovery by plaintiff from the defendant, then plaintiff is entitled to recover the sum of $3,675.52, being the amount due on the shipments delivered to the consignee within three years prior to the institution of this suit; if the court shall find that Section 7 of the Conditions of the Bills of Lading is a bar to recovery by the plaintiff from the defendant, then plaintiff is not entitled to recover.

Plaintiff's theory of the case is that Section 7 of the Conditions of the Bills of Lading can have no application to a prepaid shipment, particularly, under the facts and circumstances in this case, where the carriers, upon being advised that said shipments were for export, demanded payment of their charges in advance on the basis of the export rate, and had no notice or knowledge that said shipments, after delivery to consignee, would be so handled as to make inapplicable the export rate, and make applicable

the domestic rate; that under Section 7 of the Conditions of the Bills of Lading the carriers have a right to "require at time of shipment the prepayment or guarantee of the charges" and that the defendant could not deprive the carriers of this right of prepayment by the execution of the stipulation under Section 7 of the Conditions of the Bills of Lading. Defendant's theory of the case, as stated by plaintiff, is that having executed the stipulations on the bills of lading referred to in Section 7 of the Conditions of the Bills of Lading, and plaintiff having delivered the shipments contrary to such stipulations, has no recourse against the defendant, but must look to the consignee for any additional charges.

[fol. 58] The shipments of Sulphate of Ammonia were delivered by the defendant as shipper and consignor to the Elgin, Joliet and Eastern Railway at Gary, Indiana, consigned to the Standard Wholesale Phosphate & Acid Works, Inc., Baltimore, Maryland; and transported by that railroad and by plaintiff as terminal carrier. The shipments were made under uniform straight bills of lading in the forms prescribed by the Interstate Commerce Commission. At the time the shipments moved [and also today] there were two rates applicable to the shipments of this product from Gary to Baltimore, dependent upon whether the shipments were for export or domestic use. The rate on a shipment for export was and is lower than the rate on a shipment for domestic use. On each of the bills of lading issued upon the shipments involved here, the defendant signified that the shipment was for export, and that the freight charges thereon were to be prepaid. The defendant prepaid to the Elgin, Joliet & Eastern Railway the freight charges on each shipment from Gary to Baltimore at the export rate. The initial carrier demanded the prepayment of the freight charges in the amount set out in Exhibit "A" and defendant prepaid the amounts so demanded. The railroad tariff which published the export rate on Sulphate of Ammonia from Gary to Baltimore carried the following limitation upon the application of that rate:

"The rates named in this tariff, or as same may be amended and designated as 'export rates' will apply only on traffic delivered by the Atlantic Port Terminal carriers to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port

carrier at the port under tariffs which permit the application of the export rates and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from the carrier's stations to steamship docks and on which required proof of exportation is given."

It will be observed that each bill of lading specified that the merchandise was "consigned to Standard Wholesale Phosphate & Acid Works, Inc., destination, Curtis Bay, Baltimore, State of Maryland; route, EJ&E, Curtis, B&O, for export; freight rate, prepaid 28¢ per 100# to Baltimore; switching rate, none." The stipulation recites that the plaintiff received, transported and delivered "each of [fol. 59] said shipments to Standard Wholesale Phosphate & Acid Works, Inc., at Curtis Bay, Baltimore, Maryland; and that the plaintiff made delivery of said shipments without collection from the consignee, Standard Wholesale Phosphate & Acid Works, Inc., of any additional charges due or deemed by the plaintiff to be due on said shipments or any of them." In its brief plaintiff states that "the shipments in question, upon arrival at Baltimore, were not delivered either to the 'steamer or steamer's dock' or to the 'carrier's seaboard stations,' but on the contrary were delivered by the plaintiff upon the consignee's instruction at a building used by the consignee for storing, mixing and bagging commodities moving in both domestic and export commerce." Since the shipments as handled after delivery to consignee did not meet the tariff requirements for the application of the rate, plaintiff demanded that the defendant pay the domestic rate on the shipments and upon defendant's refusal to pay, the instant suit was brought for the difference between the total freight charges on the shipments at the domestic rate and the total freight charges prepaid by the defendant on the shipments at the export rate. The defendant pleaded that certain items were barred by the limitation of Section 16 (3) (a) that "all actions at law by carriers subject to this act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." The stipulation disposed of this defense by providing that the total freight charges at the export rate on the shipments delivered within three years prior to the instant suit were $9,801.93, which the defendant prepaid, and that the total

freight charges on the shipments at the domestic rate were $13,477.45, a difference of $3,675.52, and that if the court found that Section 7 of the Conditions of the Bills of Lading was not a bar to recovery by plaintiff, then plaintiff was entitled to recover the sum of $3,675.52.

Each of the bills of lading under which these shipments moved contained the following provision: "If charges are [fol. 60] to be prepaid, write or stamp here, 'To Be Prepaid'." The words "To Be Prepaid" were inserted by the defendant in the space provided at the time of the making of each bill of lading, and the charges on each shipment were prepaid by the defendant to the initial carrier at the export rate. Each of the bills of lading had this further provision which was signed by the defendant:

"If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)"

The pertinent portion of Section 7 of the Conditions of the Bills of Lading is as follows:

"Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges, * * * Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading the freight charges must be paid upon the articles actually shipped."

It will be noted that the shipments were exported by the consignee. Plaintiff contends that the method of handling the shipments at destination by the consignee made the export rate inapplicable and resulted in the additional charge. By their stipulation, the parties have eliminated any controversy about the claim of the railroad for the additional charges, apparently recognizing that the shipments were not handled at the point of delivery in Baltimore in such a manner as to entitle them to the export rate. Defendant contends that because of the "no recourse" clause in the bill of lading plaintiff cannot prevail in its attempt to collect the undercharge from it. Plaintiff maintains that the trial court erred in finding the issues for defendant. To sustain the judgment, defendant asserts (1) the plaintiff, [fol. 61] having failed to perform its contract by delivering the property without collection of the freight charges and all other lawful charges, is not entitled to recover from the consignor; (2) that the defendant has complied fully with the contract of transportation; that plaintiff cannot recover against the defendant in the absence of a showing that defendant has been guilty of a breach of the contract in some respect; (3) that the bill of lading contracts, including the "no recourse" clause and Section 7 of the Conditions of said bill of lading, were valid, lawful, binding and enforceable contracts; (4) that although plaintiff has no recourse against the defendant in this case, the consignee, by accepting delivery of the property, became liable to the plaintiff for the charges and its liability satisfies requirements of the Interstate Commerce Act; (5) that there is no inconsistency resulting from the prepayment by the consignor of a portion or all of the charges at the export rate as shown on the face of the uniform bill of lading and the execution by the consignor of the "prepay" and the "no recourse" clauses in the bill of lading; that the consignor may prepay all or any part of the charges, and that the protection of the "no recourse" clause is not limited to "collect" shipments; and (6) that the very purpose of the executed "no recourse" clause is to protect the consignor from liability for freight and other charges, including subsequently discovered undercharges, in the event that the carrier, contrary to the provisions of said clause, parts with possession of the property without collecting all charges due the carrier; that the "no recourse" clause provides that if the

carrier wishes to hold the consignor liable for the charges, the carrier must retain possession of the property until all the charges thereon have been paid; and that if the carrier makes delivery of the property without collecting all of said charges, the carrier can no longer hold the consignor liable, but thereafter must look solely to the consignee for payment of any unpaid charges.

The courts have uniformly held that it is the duty of the [fol. 62] carrier to collect its lawful charges. Section 6 (7) Title 49 of the United States Code provides that no carrier shall engage in or participate in the transportation of passengers or property unless the rates, fares and charges have been filed and published in accordance with the provisions of that chapter, and that no carrier shall charge, demand, collect or receive a greater or less or different compensation for such transportation, or for any service in connection therewith between the points named in such tariff, than the rates, fares and charges which are specified in the tariff filed and in effect at the time, and that no carrier shall refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities except such as are specified in such tariffs. Section 41 of this Code provides that the willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor. In *Davis* v. *Keystone Steel & Wire Co.*, 317 Ill. 278, the court said (288):

"The terms of every contract of shipment, so far as the service to be rendered and the compensation to be received are concerned, are fixed by the schedule filed with and approved by the Interstate Commerce Commission. No agreement of the parties can modify these terms, though expressed in writing and actually performed. The collection by the carrier of less than the schedule rate, though expressly agreed on, will not prevent the recovery of the shortage from the schedule rate. The rates defined by the tariff cannot be varied or enlarged by either contract or tort by the carrier."

In *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59, Mr. Justice Brandeis, speaking for the Supreme Court, said (65):

"The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges."

The Interstate Commerce Commission does not purport to determine upon whom the liability to pay transportation [fol. 63] charges shall fall. This is a matter of contract in no way controlled by the Interstate Commerce Commission. The Interstate Commerce Act is not concerned with who shall pay the transportation charges. It permits the carrier to make any contract it may see fit with reference to who shall pay the charges. Its only purpose is to prevent discrimination and rebates. It prohibits the application of any act or conduct as estopping a carrier from exacting the lawful freight rate. (*The Alton Railroad Company* v. *Gillarde*, 379 Ill. 308, 313.) In the *Central Iron Company case*, the Federal Supreme Court said (65):

"But delivery of goods to a carrier for shipment does not, under the Interstate Commerce Act, impose upon a shipper an absolute obligation to pay the freight charges. The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination. The carrier was at liberty to require prepayment of freight charges; or to permit that payment to be deferred until the goods reached the end of the transportation. *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 656. Where payment is so deferred, the carrier may require that it be made before delivery of the goods; or concurrently with the delivery; or may permit it to be made later. • • • To ascertain what contract was entered into we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract. Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the freight charges; and his obligation is ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee. For the shipper is presumably the consignor; the transpor-

tation ordered by him is presumably on his own behalf; and a promise by him to pay therefore is inferred (that is, implied in fact), as a promise to pay for goods is implied, when one orders them from a dealer. But this inference may be rebutted, as in the case of other contracts. It may be shown, by the bill of lading or otherwise, that the shipper of the goods was not acting on his own behalf; that this fact was known to the carrier; that the parties intended not only that the consignee should assume an obligation to pay the freight charges, but that the shipper should not assume any liability whatsoever therefor; or that he should assume only a secondary liability."

In a footnote on page 66 in the *Central Iron Company* case, the Supreme Court added:

"See Interstate Commerce Commission Conference Ruling No. 314, Bulletin No. 7, issued August 1, 1917: 'The law requires the carrier to collect and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharge, that being a question determinable only by a court having jurisdiction and upon the facts of each case.' This ruling which was adopted May 1, 1911 and 'interpreted' May 4, 1918, was amended, on March 6, 1922, by calling attention to the provision inserted in the Uniform Domestic Bill of Lading prescribed October 21, 1921. By that provision the consignor may (see Section 7 of Condi-[fol. 64] tions and clause on face of bill) relieve himself of all liability for freight charges. In the Matter of Bills of Lading, 52 I. C. C. 671, 721; 64 I. C. C. 347; ibid, 357; 66 I. C. C. 63."

In a case entitled In the Matter of Bills of Lading, I. C. C. Docket No. 4844, decided April 14, 1919, 52 I. C. C. 671, the Commission prescribed uniform bills of lading, including the form of domestic straight bill of lading. Speaking of the "no recourse" clause, the Commission said:

"In order to secure exemption from liability for the freight charges in case the shipment is delivered to the

consignee without the collection of such charges, the consignor is required to append his signature to the following statement in a space on the face of the bill of lading for that purpose: 'The carrier shall not make delivery of this shipment without payment of freight and other lawful charges.' "

In the case of *Michigan Central R. R. Co.* v. *Saginaw Milling Co.*, 262 N. W. 425, (272 Mich. 625), the Supreme Court of Michigan said (426):

"The purpose of the nonrecourse clause is to relieve the the consignor of liability and its presence in an order bill of lading, when properly executed, should be given effect. The carrier and the shipper are left free to contract subject to the rule which prohibits discrimination."

In the case entitled In the Matter of Bills of Lading, 52 I. C. C. 671, 721, the Interstate Commerce Commission said:

"A primary right of the carrier in the conduct of its business is that of reasonable compensation for the service rendered by it, and it is entitled to assure itself of such compensation by demanding it in advance."

There is no contention that the defendant committed any fraud. Both plaintiff and defendant believed in good faith that the shipments would be exported, and the bills of lading bore a notation that they were for export. Plaintiff accepted the charges paid to the initial carrier in accordance with the directions on the bills of lading, and it had no knowledge until after the shipments had been delivered to the consignee at Baltimore that the provisions of the export tariff would not be complied with and that the domestic rate would be the only rate legally applicable to the shipments. Defendant invokes the "no recourse" provision of Section 7 of the Conditions of the Bills of Lading. Plaintiff's posi- [fol. 65] tion is that the "no recourse" provision is limited to "collect" shipments, and does not relate to "prepaid" shipments, where the consignor has expressly undertaken to prepay the freight. Defendant contends that there is no inconsistency resulting from the prepayment by the consignor of a portion or all of the charges at the export rate as shown on the face of the bills of lading and the execution by the consignor of the "prepay" and of the "no recourse"

clauses, and that the protection of the "no recourse" clause is not limited to "collect" shipments. Defendant points out that it is a general principle of construction that, if possible, an instrument should be construed as to give effect to all of its provisions, and that in this case it is possible to give effect to both the "prepay" and the "no recourse" clauses because the shipper, in effect, stated that it had a shipment to Puerto Rico, and wished to prepay the charges to Baltimore; that it asked the carrier how much the charges would be; that on being informed the charges would be 28¢ per 100 pounds to Baltimore the shipper agreed to prepay the amount thus demanded; that to protect itself from liability for any additional charges which might accrue over and above those which the defendant by its sales contract with the consignee and by its transportation contract with the initial carrier had agreed to pay, the consignor in executing the bill of lading also signed the "no recourse" clause, which meant the carrier could not have recourse upon the consignor if it delivered the property without collecting all of the charges lawfully due. Defendant also contends that the very purpose of the executed "no recourse" clause is to protect the consignor from liability for freight and other charges, including subsequently discovered undercharges in the event that the carrier, contrary to the provisions of the clause, parts with possession of the property without collecting all charges due the carrier. Defendant points out that although the carrier has no recourse against the defendant, the consignee, by accepting delivery of the property became liable to the carrier for the charges, and its liability satisfies the requirements of the Interstate Commerce Act.

[fol. 66] Section 7 of the Conditions of the Bills of Lading provides that the consignor "shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges, and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges." Further along in Section 7 appears the following: "Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges." It is clear that in the bill of

lading the carrier reserves the right to demand prepayment of its charges. Having this right, it follows that the shipper is obligated to pay such charges where the demand is made. Each bill of lading carried the provision signed by the shipper that "the carrier shall not make delivery of this shipment without payment of freight or all other lawful charges." It is evident that the language "nothing herein shall limit the right of the carrier to require at time of shipping the prepayment or guarantee of the charges," limits the right of the shipper in the exercise of the privilege granted by the "no recourse" clause. It is obvious that if nothing shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges, the "no recourse" clause could not be construed as giving the shipper the right to deprive the carrier of its charges. In the *Central Iron Company* case the Supreme Court pointed out that the carrier was at liberty to require prepayment of the freight charges. Our inquiry then should be directed to ascertaining whether the carrier did exercise its right to require at the time of each shipment the prepayment of the charges. It will be observed that each of the bills of lading contains the following: "If charges are to be prepaid, write or stamp here 'To Be Prepaid.'" The [fol. 67] words "To Be Prepaid" were inserted by the defendant in the space provided at the time of making each bill of lading. The parties stipulated that at the time of making each shipment the initial carrier demanded the freight thereon in the amount set forth under the heading: "Amounts paid by defendant" in Exhibit "A" of the amended complaint, and that the defendant prepaid said amounts to the initial carrier as required by the bill of lading, and that the initial carrier transported each of the shipments to Curtis, Indiana and there delivered each of the shipments to the plaintiff. The stipulation further provides that "the total freight charges at the export rate on the shipments delivered within three years prior to the institution of this suit was $9,801.93, which charges the defendant prepaid on said shipments; that the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52." This sum of $3,675.52 is the difference between the export rate and the domestic rate. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who has assumed an obligation to pay the charges. The initial carrier insisted

on the payment of the charges. This carrier did not demand payment of part of the charges. It did not demand payment of charges on account. The initial carrier could not demand payment of the domestic rate until it appeared that the shipments would not take the export rate. Each bill of lading recited that the merchandise was "for export," and that the freight rate was prepaid at 28¢ per 100 pounds to Baltimore. The parties knew that this was the export rate. It is plain that the initial carrier was demanding and the shipper was prepaying the charges, and that each understood that the export rate was applicable. Following the direction of the bill of lading that "if the charges are to be prepaid, write or stamp here 'To Be Prepaid,' " the words "To Be Prepaid" were inserted by the defendant in the space provided at the time of making each such shipment. We are satisfied that when the initial carrier demands that [fol. 68] the charges be prepaid, which it has a clear right to do, that the "no recourse" clause is not applicable. Defendant points out that the shipper has the right to prepay any part or all of the charges if he wishes, and that it is a common practice for the consignor to prepay part of the charges and for the carrier to collect the remainder of the charges from the consignee. Nevertheless, the carrier can insist upon its right to require prepayment of its charges. Where a carrier accepts part payment of its charges from the consignor, that, of course, would not be a prepayment. At most it would be a prepayment of part of the charges. In a case where the railroad company accepted part payment of the charges and the shipper signed the "no recourse" stipulation, we are of the opinion that this stipulation would be effective to protect the shipper as to the balance of the charges. In such a situation it is manifest that the carrier would not be demanding prepayment of its charges. It would be a contradiction to say that the railroad company insisted on the charges being prepaid and that the shipper could not be required to pay any deficiency if the proper charges were not collected. When a shipper is required to prepay the charges, that means he is to pay all of the charges applicable to the merchandise being moved. The initial carrier required defendant to prepay the charges. In our opinion the charges which defendant agreed to pay were whatever charges were applicable to the commodity. We are of the opinion that the "no recourse" clause is not applicable to the situation covered by the stipulation.

Referring to the clause that "if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid on the articles actually shipped," plaintiff contends that defendant described the goods as being for export, when in fact they were domestic goods under the carrier's tariff, and that the change in character did not reveal itself until the goods had been delivered to the consignee and could not possibly have been known to plaintiff until the delivery had been [fol. 69] made. This is not a case of misdescription.

While it is true that the commodity shipped was Sulphate of Ammonia and that Sulphate of Ammonia was shipped, the export rate was applied on the assumption that the handling of each shipment would be in accordance with the tariff regulation. Plaintiff had no control over the handling of each shipment after it was delivered to the consignee at Baltimore. Defendant, in selling its product, had the opportunity to contract with the purchaser so as to protect iteslf by requiring that each shipment be handled so that the export rate would be applicable. Defendant states that it prepaid the charges on the shipment at the export rate and that it had no way of knowing what might happen to the shipment after delivery at Baltimore. Plaintiff points out that if the defendant did not know what the consignee might do with the shipment, how was it (plaintiff) to know? The shipping instructions from the defendant directed that delivery be made to the Wholesale Phosphate & Acid Works, Curtis Bay, Baltimore, Maryland, for export. These instructions were carried out and delivery made as directed. There were no additional charges due up to the time of delivery. We agree with the plaintiff that it would be unreasonable to expect that plaintiff should have anticipated that the consignee might not comply with the export tariff and should have withheld delivery, although the freight charges had been paid. Plaintiff required the payment of its charges at the time of shipment. At that time the defendant designated the shipments as for export and defendant prepaid the charges at the export rate. A subsequent examination as to the handling of the shipments revealed that the export rate was not applicable. A fundamental error in defendant's reasoning is that it fails to appreciate that the carrier has the right to insist upon the prepayment or guarantee of the charges, for by the express terms of Section 7 of the Conditions of the Bills

of Lading, nothing therein "shall limit the right of the carrier to require at the time of shipment the prepayment [fol. 70] of guarantee of the charges." Where the carrier manifests an intention to demand prepayment of the charges, the signing of the "no recourse" stipulation by the shipper is ineffective. Defendant suggests that if it had been the intention of the framers of the Uniform Bill of Lading to make the "no recourse" clause inapplicable to shipments marked "To Be Prepaid," they would have expressly provided in Section 7 that the "no recourse" clause should not apply in cases where the prepaid clause of the bill of lading has been executed. Defendant insists that both the "prepaid" and "no recourse" clauses can be given effect and that the court should construe the bill of lading contract so as to give effect to all of its provisions. The law requires a shipper to pay all of the charges in advance if demand therefor is made by the carrier. Delivery of the shipment does not change the primary obligation of the shipper to pay the charges. Where the carrier insists on prepayment of the charges the shipper cannot by signing the "no recourse" stipulation, avoid its obligation to pay all of the charges, and if through some mistake all of the charges are not collected in advance, the liability of the shipper to pay persists. Counsel for the defendant submitted to us a copy of an opinion filed November 10, 1942 in the United States District Court for the District of Minnesota, Fourth Division, in the case of *Chicago Great Western Railway Co.* v. *Hopkins et al.*, No. 497 Civil. While this opinion is in point on the issues before us, we do not agree with the reasoning or the result.

We are of the opinion that the "no recourse" clause of the Conditions of the Bill of Lading was not applicable to the shipments of Sulphate of Ammonia, and that plaintiff is entitled to recover the difference between the domestic rate and the export rate on the shipments delivered within three years prior to the institution of the suit, of $3,675.52 Therefore, the judgment of the Superior Court of Cook [fol. 71] County is reversed and the cause remanded with directions to enter a judgment for the plaintiff and against defendant in the sum of $3,675.52 and costs.

Reversed and Remanded With Directions

Hebel, J, and
Kiley, J, Concur.

[fol. 72] And afterwards, on the same day to-wit: the 9th day of December A. D. 1942, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 73] No. 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises, on a rehearing in said cause are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment aforesaid, there is manifest error: Therefore, it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the Judgment of the Superior Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County with directions to said Superior Court to enter a judgment for the plaintiff and against defendant in the sum of $3,675.52 and costs. And it is further considered by the Court that the said Appellant recover of and from the said Appellee its costs, by it in this behalf expended to be taxed, and that it have execution therefor.

[fol. 74] And afterwards, on the 6th day of January A. D. 1943, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 75] IN RE PUBLICATION OF WRITTEN, Decisions of this Court:

It is hereby ordered that the cases, the numbers and titles of which are given below, the written decisions of this Court filed the 9th day of December A. D. 1942, shall be published in full in the Appellate Court Reports.

And the decisions so filed which are not designated below shall be published by including an adequate abstract of such written decisions. 42145. B. & O. R. R. Co. v. Illinois Steel Co.

And afterwards, on the 13th day of January A. D. 1943, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 76] No. 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

The Court having considered the motion of Appellee that the issuance of the mandate herein be stayed until the time for the filing of a petition in ... Supreme Court of Illinois for leave to appeal to review the judgment of this Court in said cause shall have expired, or if such petition shall have been filed within the proper time, then until said petition shall have been granted or refused; and the Court, being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards, on the same day to-wit: the 13th day of January A. D. 1943, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 77] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

The Court having considered the motion of Illinois Steel Company, a corporation, Appellee in this cause and Defend-

ant in the Superior Court of Cook County, for the issuance of the Certificate of this Court that there is fairly involved in the claim of The Baltimore and Ohio Railroad Company, a corporation, Appellant in said cause and Plaintiff in the Superior Court of Cook County more than Fifteen Hundred Dollars ($1,500.00) as per reasons and affidavit filed herein. And the Court being fully advised in the premises, are of the opinion and Therefore Certify that more than Fifteen Hundred Dollars ($1,500.00) is fairly involved in the claim of The Baltimore and Ohio Railroad Company, a Corporation, Appellant herein and Plaintiff in the Superior Court of Cook County.

Joseph Burke, Oscar Hebel, Roger J. Kiley, Justices of the Third Division, Appellate Court, First District, Illinois.

[fol. 78] And afterwards, on the 19th day of March, A. D. 1943, it being one of the days of the February Term A. D. 1943, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 79] 42145

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Appellant,

vs.

ILLINOIS STEEL COMPANY, a Corporation, Appellee

Appeal from Cook Superior

The Court having considered the motion of Appellee that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court in said cause shall have expired without any such petition having been filed, and if such petition for said writ shall have been filed within the proper time, then until said writ of certiorari shall have been granted or refused; and the Court, being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards, on the 22nd day of March A. D. 1943, there was filed in the Office of the Clerk of said Appellate

Court, a certified copy of an order of the Supreme Court of Illinois, denying the petition for leave to appeal in said cause, which said order is in the words and figures following, to-wit:

[fol. 80] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of March in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: Clyde E. Stone, Chief Justice; Justice Francis S. Wilson, Justice Loren E. Murphy, Justice William J. Fulton, Justice Walter T. Gunn, Justice June C. Smith, Justice Charles H. Thompson, George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be It Remembered, that, to-wit: on the 11th day of March 1943, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 27104

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Respondent

vs.

ILLINOIS STEEL COMPANY, a Corporation, Petitioner

Petition for Leave to Appeal from Appellate Court

First District. 34S.1752-42145

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois and keeper of records,

files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 20th day of March A. D. 1943.

Edward F. Cullinane, Clerk pro tempore, Supreme Court of the State of Illinois. (Seal.)

[Endorsed:] 42145. No. 27104. Supreme Court of Illinois. The Baltimore and Ohio R. R. Co., etc., Respondent vs. Illinois Steel Co., etc., Petitioner. Denial Petition. Leave to Appeal. Filed Appellate Court. Mar. 22, 1943. Sheldon W. Govier, Clerk.

[fol. 81] I, Sheldon W. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois and keeper of the records, files and seal thereof, Do Hereby Certify that the foregoing pages numbered 1 to 24 inclusive, are a true copy of the Abstract of Record filed by the Appellant in the case of The Baltimore and Ohio Railroad Company, a corporation, vs. Illinois Steel Company, a Corporation, in said Appellate Court on January 13th A. D. 1942.

I further certify that the foregoing pages 25 to 79 are a true, full and complete Transcript of the Record of proceedings of said Appellate Court in the case of The Baltimore and Ohio Railroad Company, a corporation, vs. Illinois Steel Company, a Corporation, of record in my office, and also of the opinions of said Appellate Court rendered herein and filed in said cause on the 3rd day of July A. D. 1942 and on the 9th day of December A. D. 1942, and also a certified copy of the order of the Supreme Court of Illinois denying Leave to Appeal in said cause which was filed in said Appellate Court on the 22nd day of March A. D. 1942, in said cause, as all of the same now apear on file in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Appellate Court, Illinois, First District, at Chicago, Illinois, this 25th day of March in the year of our Lord One Thousand Nine Hundred and Forty-three.

Sheldon W. Govier, Clerk of the Appellate Court, First District, Illinois. (Seal.)

ORDER ALLOWING CERTIORARI.—Filed October 11, 1943

The petition herein for a writ of certiorari to the Appel-ate Court of the State of Illinois, First District, is granted.

And it is further ordered that the duly certified copy of he transcript of the proceedings below which accompanied he petition shall be treated as though filed in response to uch writ.

Endorsed on Cover: Enter Paul R. Conaghan. File No. 7,591. Illinois, Appellate Court, First District. Term No. 9. Illinois Steel Company, Petitioner, vs. Baltimore and Ohio Railroad Company. Petition for a writ of certiorari nd exhibit thereto. Filed June 11, 1943. Term No. 99, O. T. 1943.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 1[illegible]

ILLINOIS STEEL COMPANY,

Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND SUPPORTING BRIEF.

PAUL R. CONAGHAN,
Counsel for Petitioner.

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SUBJECT INDEX.

	PAGE
Petition for writ of certiorari	1-6
A. Summary and short statement of the matte involved	1
B. Statement of the basis upon which it is contended that this Court has jurisdiction to reverse the judgment of the Appellate Court of Illinois, First District	2
C. The questions presented	4
D. Reasons relied on for the allowance of the writ	6
Brief in support of petition	7-14
I. Report of opinion	7
II. Statement of grounds on which jurisdiction of this Court is invoked	7
III. Statement of the case	8
IV. Specification of assigned errors intended to be urged	8
V. Argument	9-14
Conclusion	14

TABLE OF CASES CITED.

Chicago and E. I. Railroad Co. v. Industrial Commission, 285 U. S. 296	3
Chicago Great Western Ry. Co. v. Hopkins, et al., 48 Fed. Supp. 60	3, 4, 11
C. & O. Ry. Co. v. Mihas, 208 U. S. 102	3
In the Matter of Bills of Lading, 52 I.C.C. 671; 64 I.C.C. 357; 66 I.C.C. 63; 167 I.C.C. 214; 172 I.C.C. 362	3, 10
L. & N. R. R. Co. v. Central Iron Co., 265 U. S. 59, 66	3, 4, 12
Minneapolis, St. Paul and Sault Ste. Marie v. Rock, 279 U. S. 410	3
Pittsburgh, C., C. & St. L. Ry. Co. v. Fink, 250 U. S. 577	11, 12
Western and Atlantic R. R. Co. v. Underwood, 281 Fed. 891	12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. .....

ILLINOIS STEEL COMPANY,

Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND SUPPORTING BRIEF.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Illinois Steel Company, respectfully represents that it is aggrieved by the final judgment of the Appellate Court of Illinois reversing the judgment of the Superior Court of Cook County in favor of your petitioner and remanding the case to the Superior Court of Cook County (the trial court) with directions to enter a judgment for the respondent and against your petitioner in the sum of $3,675.52 and costs (R. 62).

A.

Summary and Short Statement of the Matter Involved.

In an amended complaint filed in the Superior Court of Cook County on February 28, 1934 (R. 2, 3), the respondent sought to recover from your petitioner a balance of freight charges claimed to be due on a number of shipments of sulphate of ammonia made by your petitioner

as consignor from its plant at Gary, Indiana, to Wholesale Sulphate and Acid Works, Inc., Baltimore, Md., as consignee, for export.

Attached to the complaint was an exhibit giving complete data as to each shipment, including the lawful charge, the amount paid by your petitioner, and the balance claimed to be due (R. 4, 5). Your petitioner prepaid the freight charges at the export rate. Additional charges are alleged to be due because the export rate is alleged not to be applicable to the shipments. The respondent claims that the domestic rate, higher than the export rate, was applicable under the tariffs of the carriers making the shipment.

The case was tried before the trial court upon the stipulation of facts. The trial court found the issues in favor of your petitioner and entered a judgment for costs against the respondent (R. 22, 23). The respondent appealed to the Appellate Court of Illinois, First District.

On rehearing on December 2, 1942, the Appellate Court reversed the judgment of the Superior Court and remanded with directions to enter a judgment for the respondent and against your petitioner in the sum of $3,675.52 and costs (R. 62).

Thereafter, your petitioner filed its petition for leave to appeal in the Supreme Court of Illinois. This petition was denied on March 11, 1943 (R. 66). The denial of this petition by the Supreme Court of Illinois makes final the judgment of the Appellate Court.

B.

Statement of the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Reverse the Judgment of the Appellate Court of Illinois, First District.

The jurisdiction of this Court to grant this petition for a writ of certiorari is invoked by Sections 237(b) and

240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 344, 350).

The judgment of the Appellate Court sought to be reversed by your petitioner, in effect was affirmed by the Supreme Court of Illinois on March 11, 1943, when the Supreme Court of Illinois, the highest court of the State, denied your petitioner's leave to appeal (R. 66). The time limit for filing this petition for certiorari runs from the date when your petitioner's leave to appeal was denied by the Supreme Court of Illinois, or from March 11, 1943. (*Chicago and E. I. Railroad Co.* v. *Industrial Commission*, 285 U. S. 296; *C. & O. Ry. Co.* v. *Mihas*, 208 U. S. 102; *Minneapolis, St. Paul and Sault Ste. Marie* v. *Rock*, 279 U. S. 410.)

The rule announced by the Appellate Court in the case at bar (R. 28-41) conflicts with the decisions of this Court in *L. & N. R. R.* v. *Central Iron Co.*, 265 U. S. 59, 66, and of the Federal District Court in the case of *Chicago, Great Western Ry. Co.* v. *Hopkins, et al.*, 48 Fed. Supp. 60, and deprives your petitioner of its property without due process of law by the improper construction of the "no recourse" clauses in uniform bills of lading issued pursuant to and in compliance with the Interstate Commerce Acts.

The federal law as construed by the Federal Courts is supreme. Any state decision conflicting with the construction of the Federal Courts is erroneous. *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 66; *In the Matter of Bills of Lading*, 52 I. C. C. 671; 64 I. C. C. 357; 66 I. C. C. 63; 167 I. C. C. 214; 172 I. C. C. 362.

The question whether prepayments to the initial carrier of the amounts set forth in bills of lading deprive your petitioner of the benefit of "no recourse" clauses in uniform bills of lading in the event that the carrier, contrary to the provisions of this clause, parts with the possession of the property shipped without collecting all charges due, remains unsettled by the conflict of the opinion of the

Appellate Court in the case at bar, with the opinions of this Court in *L. & N. R. R.* v. *Central Iron Co.*, 265 U. S. 59, 66 and of the Federal District Court of Minnesota in *Chicago Great Western Ry. Co.* v. *Hopkins, et al.*, 48 Fed. Supp. 60.

The matter of the construction of "no recourse" clauses in uniform bills of lading is important to all carriers, shippers and consignees. It has assumed special importance recently because of the many Lend-Lease shipments.

The conflict in the decisions of the Appellate Court, this Court and the Federal District Court of Minnesota will tend to create a diversity of decisions in the lower courts. This will seriously affect uniformity and the administration of settled rules of construction in other cases.

This Court should exercise its jurisdiction in this case not merely to determine whether there was an improper application of controlling leading principles but for the purpose of pronouncing the legal principles which should be applied. The question is not one of mere applicability of rules of law. The question of what legal rules should be applied to consignees who ship prepaid on "no recourse" bills is the important question which should be finally determined by this Court granting this petition for a writ of certiorari.

C.

The Questions Presented.

1. Whether the purpose of the "no recourse" clause in uniform bills of lading is to protect the consignor from liability for charges known or unknown, including subsequently discovered undercharges or additional charges, when a delivering carrier makes delivery without requiring the payment of such charges, contrary to the stipulation in the bill of lading.

2. Whether a delivering carrier, contrary to the provisions of the "no recourse" clause parts with the possession of the property shipped without collecting from the consignee all charges due, may collect subsequently discovered undercharges or additional charges from the consignor who shipped "prepaid" or whether the delivering carrier must look for payment solely to the consignee.

3. Whether a carrier in making a delivery to the consignee without requiring payment of charges subsequently discovered to be due on shipments prepaid by the consignor under "no recourse" bills of lading, which provide in part that the consignor "shall not be liable for such charges," may, notwithstanding the provisions of a "no recourse" clause in bills of lading, collect subsequently discovered undercharges or additional charges from the consignor.

4. Whether, under such circumstances, if the delivering carrier knows or should have known that it was not making deliveries required by the export tariff under which the consignor directed prepaid shipments to be made, the carrier's only remedy for additional charges resulting from diverted deliveries is against the consignee who knows or should have known of the diversions or, in addition, against the consignor.

5. Whether part payment of all charges to the initial carrier before shipments began moving for export under "no recourse" bills of lading stamped prepaid, render the consignor, or the consignee alone, liable to the delivering carrier for the balance of charges discovered by the delivering carrier to be due after delivery.

6. Whether, under such circumstances, the rule of the Appellate Court that the consignor is liable shall prevail or whether there shall prevail the rule of the Federal Courts that the consignor is not liable and the delivering carrier must look solely to the consignee.

D.

Reasons Relied On For the Allowance of Writ.

The rule of the Appellate Court conflicts with the rule of the Federal Courts. There should be uniformity in the rule to be applied. Vicarious construction of uniform bills of lading should not be permitted to create unnecessary risks or uncertainties in interstate shipments by common carrier. The facts are undisputed. The parties have stipulated as to them (R. 14-21).

The problem presented is merely a matter of construction of the "no recourse" clause, Section 7 and the prepayment clause in uniform bills of lading as applied to the facts. There should be uniformity in the construction of bills of lading because the documents themselves are uniform. The matter is of such commercial importance to carriers, shippers and consignees that clauses in uniform bills of lading should not bring one result in the Illinois Courts and other state courts which may follow the Illinois rule and another result in the Federal Courts. Such an important question should be reviewed by this Court upon certiorari.

Respectfully submitted,

ILLINOIS STEEL COMPANY,
Petitioner,

PAUL R. CONAGHAN,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. .....

ILLINOIS STEEL COMPANY,
Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Report of Opinion.

The opinion of the Appellate Court on rehearing (R. 44-62) is reported in 316 Ill. Appellate 516 and 46 N. E. 2nd 144.

II.

Statement of Grounds on Which Jurisdiction of This Court Is Invoked.

Jurisdiction of this Court is invoked in accordance with the provisions of Sections 237(b) and 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28

U. S. C. A. 344, 350) and as more particularly set forth in Part B of the preceding petition.

III.

Statement of the Case.

A concise statement of the case is made in the petition preceding under Part A.

IV.

Specification of Assigned Errors Intended to be Urged.

The Appellate Court erred:

1. In construing that part of Section 7 (the "no recourse" clause) of the uniform bills of lading, approved by the Interstate Commerce Commission and executed by your petitioner on each shipment, which provided:

> "Sec. 7. * * * The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. * * *" (R. 18, 47.)

so as to render liable your petitioner as consignor, notwithstanding the fact that the carrier made delivery of the shipments without requiring payment of the charges subsequently discovered or found to be due.

2. In holding that the "no recourse" clause was not applicable to the situation covered by the stipulation of facts.

3. In holding that the "no recourse" clause was inapplicable to prepaid shipments.

4. In reversing the judgment of the trial court and remanding the case to the trial court with directions to enter judgment for the plaintiff and against your petitioner in the sum of $3,675.52 and costs.

V.

ARGUMENT.

A.

The Carrier Made Deliveries of the Shipments Before Receiving Payment of All Charges Due. After Such Deliveries, the Carrier Surrendered All Claims Against Your Petitioner.

Section 7 of the uniform bills of lading, approved by the Interstate Commerce Commission and executed by your petitioner on each shipment in this case, in part provided:

> "Sec. 7. * * * The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. * * *" (R. 17, 18).

The parties stipulated (R. 17) that each of the bills of lading covering the shipments in question was signed by

an authorized employee of your petitioner, in part, as follows:

> "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
>
> "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions.)
>
> Illinois Steel Company,
>
> Per .....
>
> (Signature of Consignor)"

That part of Section 7 of the uniform bills of lading hereinbefore quoted expressly provides that the consignor shall not be liable for freight and other lawful charges if the consignor signs the "no recourse" clause on the face of the bill of lading and if delivery is made to the consignee without requiring payment of the freight, and all other lawful charges from the consignee.

When the carrier made deliveries to the consignee without requiring payment of all lawful charges, the bill of lading clearly provides that the consignor "shall not be liable for such charges."

In the Matter of Bills of Lading, 52 I. C. C. 671, the Commission at page 721 stated:

> "• • • In order to secure exemption from liability for the freight charges in case the shipment is delivered to the consignee without the collection of such charges, the consignor is required to append his signature to the following statement in a space on the face of the bill of lading provided for that purpose: 'The carrier shall not make delivery of this shipment without payment of freight and other lawful charges.'"

In the case of *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59, this Court at page 66 stated:

"By that provision the consignor may (see Section 7 of Conditions and clause on face of bill) relieve himself of all liability for freight charges."

In *Chicago Great Western R. R. Co.* v. *Hopkins, et al.*, 48 Fed. Supp. 60, the Court at page 62 stated:

"In other words, it is fair to assume that the parties intended that any lawful charges in addition to those paid must be collected from the consignee if delivery was accepted by such consignee under the contract which the consignor and the carrier had entered into. This interpretation of the agreement between the parties seems eminently fair and reasonable. Certainly, the situation herein will not warrant a finding that the parties indulged in a futile and aimless thing when they entered into the 'no recourse clause.' It is reasonable to believe that they did so for some purpose, and the purpose as herein indicated and construed is entirely consistent and compatible with the prepayment of the freight charges as computed by the parties. This construction squares not only with the apparent intent of the parties, but does not violate the rights of the consignee. The latter, upon receipt of the freight, was informed that there would be no recourse on the consignor for any freight charges or other lawful charges in addition to that which had been paid. The consignee therefore accepted the shipment with knowledge that he alone must respond for any deficiency in the freight charges. *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink, supra.* [250 U. S. 577.] It is my opinion, therefore, that the 'no recourse' contract entered into between the consignors and the carrier discharges the consignors from any claim of

undercharges after the shipment has been received and accepted by the consignee under the uniform bill of lading as executed herein."

The law is well settled that a consignee cannot accept delivery without incurring liability for the carrier's charges, known or unknown, or discovered subsequent to delivery, whether those charges were supposed to have been prepaid or otherwise, and regardless of the consignee's actual relation with the consignor. (*Western and Atlantic R. R. Co.* v. *Underwood*, 281 Fed. 891; *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577.)

Delivery of goods for shipment does not necessarily import an obligation of the consignor to pay the freight charges. The carrier and consignor are free to contract as to when and by whom full payment shall be made. (*L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59.)

In the case at bar, the carrier and the consignor did contract that the consignor shall not be liable for the charges in the event that the carrier made delivery without requiring payment of all lawful charges. The Appellate Court decision prevented performance of this contract by the construction (in effect making a new contract) that the "no recourse" clause is not applicable when the shipment is prepaid.

B.

The Place of the Carrier's Delivery Made the Export Tariffs Inapplicable. The Carrier Knew or Should Have Known That It Was Not Making Deliveries Required by the Export Tariff. The Carrier's Sole Remedy for Freight Charges Resulting From These Diverted Deliveries Was Against the Consignee Directing the Diversions.

The place where the carrier spotted the shipments for unloading made the export tariff inapplicable. At the

time of each delivery the carrier knew or should have known that additional charges were applicable. The carrier should have no claim against your petitioner because of the provisions of the "no recourse" clause. The sole remedy of the carrier should be against the consignee.

The stipulated facts recite that the carrier delivered shipments to the consignee for unloading "through the doors in the sides of said buildings and dumped into bins" (R. 16).

Thereafter, the consignee placed the shipment "in bags and handled through the doors in the ends of the building across short uncovered wharves or aprons and loaded into steamers alongside such wharves and exported" (R. 16). The carrier knew or should have known that it was not delivering these shipments "to the steamer or steamers direct," as required by the export tariff.

C.

Part Payments of the Charges to the Initial Carrier Before Shipments Under "No Recourse" Clauses in Bills of Lading Rendered the Consignee Alone Liable to the Carrier For the Balance of Charges Due After Delivery.

There was prepayment of part of the charges on each shipment made. Each bill of lading (R. 18) contained the following statement signed by the initial carrier:

"Received $..... to apply in prepayment of the charges on the property described hereon.

.....

Agent of Cashier

Per .....

(The signature here acknowledged only the amount prepaid.)"

The prepayment of the export charges by your petitioner on each shipment in fact was a part payment of all of the charges. This part prepayment, even under the decision of the Appellate Court in the case at bar, renders operative the "no recourse" clause and protects your petitioner as consignee from the balance of the lawful charges in each case, where as in the case at bar, the carrier made delivery without requiring payment of all of its lawful charges.

CONCLUSION.

The carrier lost its claim against the consignor when it delivered the shipments contrary to the stipulation in the bills of lading to the consignee without requiring payment of all of the lawful charges.

The very purpose of the "no recourse" clause is to protect a consignor from liability for unknown charges, including subsequently discovered undercharges or additional charges. In the event that the carrier, contrary to the provisions of the "no recourse" clause, parts with possession of the property shipped without collecting all charges due, the carrier must look for payment to the consignee alone. If the carrier intends to hold the consignor liable for all lawful charges on prepaid shipments containing "no recourse" clauses in bills of lading, the carrier must retain possession of the property shipped until it determines that all charges due have been paid.

The petitioner should be granted a writ in this case to make certain the applicable rules of law to consignors who ship under "no recourse" bills. Otherwise, the present confusion created by the Appellate Court opinion in the case at bar will create even greater uncertainties.

Respectfully submitted,

PAUL R. CONAGHAN,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 99

ILLINOIS STEEL COMPANY,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

REPLY BRIEF FOR PETITIONER.

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Chicago, Illinois,
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SUBJECT INDEX.

	PAGE
Opinion below	1
Jurisdiction	1
Statement of the case	2
Questions presented	2
Specification of assigned errors	5
Summary of argument	6
Argument	8
A. The history of Section 7 before the Interstate Commerce Commission clearly indicates the "no recourse" clause exempts the consignor from liability for freight and all other lawful charges, after delivery of the shipment, not withstanding the right of the carrier to require prepayment or guarantee of the charges	8
B. The mere placing of the words "To be Prepaid" on the face of each bill of lading by the consignor does not make a contract for the consignor to pay "all lawful charges," if the consignor signs the "no recourse" clause and the carrier makes delivery of the shipment, contrary to the stipulation on the face of the bill of lading	15
C. The respondent knew or should have known that it was not making deliveries required by the export tariff under which the consignor directed the prepaid shipments to be made. The responsibility of the carrier moving an export shipment is a continuing responsibility imposing a duty upon the carrier to know the provisions of the export tariff for the purpose of obtaining compliance therewith and requiring proof of exportation	23

PAGE

D. Part prepayment of the charges to the initial carrier rendered effective the "no recourse" clause and, after delivery, protected the consignor from liability for the balance of the charges 24

Conclusion 25

TABLE OF CASES CITED.

Chesapeake & Ohio R. R. Co. v. Glogora Coal Co., 113 W. Va. 796, 169 S. E. 471 22

Chicago Great Western Ry. Co. v. Hopkins, et al., 48 F. Supp. 60 ..... 17, 19, 25

In the Matter of Bills of Lading, 52 I.C.C. 671 ..... 8, 9, 11, 14

In the Matter of Bills of Lading, 64 I.C.C. 357 ..... 11, 14

In the Matter of Bills of Lading, 66 I.C.C. 63 ..... 12, 14

Louisville & Nashville R. R. Co. v. Central Iron Co., 265 U. S. 59 ..... 14, 15, 24

New York Central R. Co. v. Union Oil Co., 53 F. 2d, 1066 22

Pittsburgh, C., C. & St. L. Ry. Co. v. Fink, 250 U. S. 577 ..... 15, 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 99

ILLINOIS STEEL COMPANY,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

REPLY BRIEF FOR PETITIONER.

I.

Opinion Below.

The opinion of the Appellate Court on rehearing (R. 38-56) is reported in 316 Ill. App. 516 and 46 N.E. 2d 144.

II.

Concise Statement of the Grounds on which Jurisdiction of this Court is Invoked.

Jurisdiction of this Court is invoked in accordance with the provisions of Section 237(b) and 240(a) of the Judicial Code, as amended (28 USCA 344, 350).

III.

Statement of the Case.

Respondent's statement of the case does not contain all that is material to the consideration of the questions presented.

For that reason, it is deemed necessary to correct an inaccuracy in the statement of the case set forth in the brief of the respondent on page 4 as follows:

> "The only question in this case is whether the provisions of Section 7 release petitioner (consignor) from liability for the additional freight charges admittedly due on the said shipments in the face of petitioner's express undertaking as to each shipment that the lawful freight charges thereon were to be prepaid by petitioner."

The "only question" is an oversimplification of the issues.

Questions presented by the issues in this case are set forth by petitioner in its petition for a writ of certiorari heretofore filed with this Court and are as follows:

1. Whether the purpose of the "no recourse" clause in uniform bills of lading is to protect the consignor from liability for charges known or unknown, including subsequently discovered undercharges or additional charges, when a delivering carrier makes delivery without requiring the payment of such charges, contrary to the stipulation in the bill of lading.

2. Whether a delivering carrier, contrary to the provisions of the "no recourse" clause parts with the possession of the property shipped without collecting from the consignee all charges due, may collect subsequently dis-

covered undercharges or additional charges from the consignor who shipped "prepaid" or whether the delivering carrier must look for payment solely to the consignee.

3. Whether a carrier in making a delivery to the consignee without requiring payment of charges subsequently discovered to be due on shipments prepaid by the consignor under "no recourse" bills of lading, which provide in part that the consignor "shall not be liable for such charges," may, notwithstanding the provisions of a "no recourse" clause in bills of lading, collect subsequently discovered undercharges or additional charges from the consignor.

4. Whether, under such circumstances, if the delivering carrier knows or should have known that it was not making deliveries required by the export tariff under which the consignor directed prepaid shipments to be made, the carrier's only remedy for additional charges resulting from diverted deliveries is against the consignee who knows or should have known of the diversions or, in addition, against the consignor.

5. Whether part payment of all charges to the initial carrier before shipments began moving for export under "no recourse" bills of lading stamped prepaid, render the consignor, or the consignee alone, liable to the delivering carrier for the balance of charges discovered by the delivering carrier to be due after delivery.

6. Whether, under such circumstances, the rule of the Appellate Court that the consignor is liable shall prevail or whether there shall prevail the rule of the Federal Courts that the consignor is not liable and the delivering carrier must look solely to the consignee.

Furthermore, "petitioner's express undertaking as to each shipment that the lawful freight charges thereon were to be prepaid by petitioner", stated by the respond-

ent in its brief on page 4 to be part of "the only question in this case" is argumentative.

Section 7 of the uniform straight bills of lading in part provided:

> "The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor . . . shall not be liable for such charges." (R. 14).

This language requires examination of the face of the bill of lading to ascertain what the consignor stipulated by signature. The stipulation of facts signed by the parties leaves no doubt on this point. It in part provided (R. 13):

> That each of the bills of lading covering the shipments contained the following provision, signed by the defendant by one of its authorized employees:
>
> "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
>
> "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions.)
>
> Illinois Steel Company, Per.....
> (Signature of consignor)."

The face of each bill of lading provided also that each shipment was for export, sometimes indicating that the shipment was for loading on a vessel sailing from Balti-

more, Maryland on specified dates (R. 13). Each bill of lading, among other things (R. 13), specified:

"Consigned to Standard Wholesale Phosphate & Acid Works, Inc.

Destination—Curtis Bay—Baltimore, State of Maryland.

Route—EJ&E, Curtis, B&O—for export—

Freight rate—Prepaid 28¢ per 100# to Baltimore.

Switching rate—none.

J.L.—destination N.A. 5 for export to Porto Rico. Must go through to coast without transfer on account of liability of damage to contents consisting of sulphate of ammonia for fertilizer purposes."

The face of each bill of lading also contained the following (R. 13):

"If charges are to be prepaid, write or stamp here 'To be Prepaid'."

The words "To be Prepaid" were inserted by the consignor in the space provided at the time of the making of each such bill of lading (R. 13).

IV.

Specification of Assigned Errors Intended to be Urged.

The Appellate Court erred:

1. In construing that part of Section 7 (the "no recourse" clause) of the uniform straight bills of lading, approved by the Interstate Commerce Commission and executed by your petitioner on each shipment, which provided:

"Sec. 7. * * * The consignor shall be liable for the freight and all other lawful charges, except that if

> the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. * * *'' (R. 14)

so as to render liable your petitioner as consignor, notwithstanding the fact that your petitioner stipulated, by signature, in the space provided for that purpose on the face of each of the bills of lading that the carrier shall not make delivery without requiring payment of the freight and all other lawful charges (R. 13) and the fact that the carrier made delivery of the shipments without requiring payment of the charges subsequently discovered or found to be due.

2. In holding that the "no recourse" clause was not applicable to the situation covered by the stipulation of facts.

3. In holding that the "no recourse" clause was inapplicable to prepaid shipments.

4. In reversing the judgment of the trial court and remanding the case to the trial court with directions to enter judgment for the plaintiff and against your petitioner in the sum of $3,675.52 and costs.

V.

SUMMARY OF ARGUMENT.

The history of Section 7 before the Interstate Commerce Commission clearly indicates that *after delivery* of the shipment, the "no recourse" clause exempts the consignor

from liability for freight and all other lawful charges. The right of the carrier to require prepayment or guarantee of its charges was contained in the first uniform domestic straight bill of lading prescribed by the Commission and was not considered by the carriers, the shippers or the Commission as obscuring the limitation upon the liability of the consignor resulting from the "no recourse" clause, if the carriers, contrary to the stipulation, made delivery of the shipment without obtaining payment of the freight and all lawful charges.

The mere placing of the words "To be Prepaid" on the face of each bill of lading by the consignor does not make a "contract" between the consignor and the carrier for the consignor to pay *all lawful charges*, if the consignor signs the "no recourse" clause and the carrier violates that clause and makes delivery of the shipment.

The respondent knew or should have known that it was not making deliveries required by the export tariff under which the consignor directed the prepaid shipments be made. The responsibility of the carrier moving an export shipment is a *continuing responsibility*, imposing a duty upon the carrier to know the provisions of the export tariff, especially when the carrier has notice it is a prepaid "no recourse" shipment. If the prepaid "no recourse" shipments are delivered and the carrier later discovers the export rates were not applicable, the consignor is not liable for the balance of the charges due.

Each bill of lading in the case at bar was a receipt for the amount of the freight prepaid computed in accordance with the rate set forth on the face of each bill of lading. Thus, each bill of lading was a receipt for prepayment of part of the charges. This part prepayment renders the "no recourse" clause applicable and protects the consignor from liability for the balance of the charges due.

VI.

ARGUMENT.

A.

The history of Section 7 before the Interstate Commerce Commission clearly indicates the "no recourse" clause exempts the consignor from liability for freight and all other lawful charges, after delivery of the shipment, notwithstanding the right of the carrier to require prepayment or guarantee of the charges.

In 1919 when the Interstate Commerce Commission first prescribed a uniform domestic straight bill of lading for use by common carriers, (*In the Matter of Bills of Lading*, 52 I.C.C. 671, 741, Appendix B), Section 7 read as follows:

> "The owner or consignee shall pay the freight and average, if any, and all other lawful charges accrued on said property, and, if required, shall pay the same before delivery. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Both the shippers and the carriers were in agreement upon the phraseology of this section, except that the shippers proposed that there be inserted in the bill immediately following the words "face of this bill of lading" the additional words "or in a written order of reconsignment." The carriers objected to this proposal. The Commission sustained the objection. The Commission (*In the Matter of Bills of Lading,* 52 I.C.C. 671, 721) stated:

> "A primary right of the carrier in the conduct of its business is that of reasonable compensation for the service rendered by it, and it is entitled to assure itself of such compensation by demanding it in advance. In ordinary commercial practice, however, the carrier waives its right to prepayment of charges and looks to the consignee for the same, its claim being secured by a lien upon the goods. There is a presumption, when goods are transported without exaction of charges in advance, that the consignee is liable for the same as the owner of the goods and that the carrier may look to him for payment. This, however, is a rebuttable presumption. The consignor, being the one with whom the contract of transportation is made, is originally liable for the carrier's charges and unless he is specifically exempted by the provisions of the bill of lading, or unless the goods are received and transported under such circumstances as to clearly indicate an exemption for him, the carrier is entitled to look to the consignor for his charges. In order to secure exemption from liability for the freight charges in case the shipment is delivered to the consignee without the collection of such charges, the consignor is required to append his signature to the following statement in a space on the face of the bill of lading provided for that purpose: 'The carrier shall not make delivery of this shipment without payment of freight and other lawful charges.'"

Thus, notwithstanding the language in Section 7 that "Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges," the Commission in prescribing the language for Section 7 recognized that the consignor secured "exemption from liability" for the "freight and all other lawful charges" if the consignor signed the statement on the face of the bill of lading (R. 13) provided for that purpose:

> "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."

The carriers acquiesced in the consignor's "exemption from liability" for "freight and all other lawful charges" by the consignor's stipulation on the face of the bill. When, however, the shippers desired to extend this exemption from liability to a similar stipulation "in a written order of reconsignment," the Commission (p. 722) stated:

> "It is further urged that to omit a provision of this kind from the bill of lading will prevent the shippers enjoying a large measure of the protection carried by Section 7 against bills for overcharges or for freight charges not paid by parties who at the time the freight was received were amply able to pay the charges thereon."

The Commission recognized that the exemption from *liability* intended by Section 7 and the signing by the consignor of the stipulation on the face of the bill were for the purpose of protecting the consignor "against bills for overcharges or for freight charges not paid" by the consignee.

The carriers objected to the addition of the phrase "or in a written order of reconsignment" to Section 7 for the

reasons, among others, (*In the Matter of Bills of Lading*, 52 I.C.C. 671, 722) that:

> "a carrier, touching the important matter of the payment and collection of freight charges—a matter which relates to the paramount purpose of the act to regulate commerce itself—should be permitted to rely upon the bill of lading issued when the transaction is initiated, and not compelled to observe instructions which would often be hastily and inaccurately transmitted while the shipment is en route. In the third place, it is much easier for a consignor to take the onus at the outset of determining whether he will assume and continue to bear the common-law liability for the payment of the freight charges, or the qualified liability which will accrue under the provision conceded by the carriers, than it is for a carrier to guard against the consequences of having an attempt made to change the liability status while the shipment is being transported."

The carriers recognized, also, that the carrier should "rely upon the bill of lading issued when the transaction is initiated" and that the consignor should take "the onus at the outset of determining" whether it would "assume and continue to bear the common-law liability for the payment of the freight charges" or whether it would assume only "qualified liability" by stipulating on the face of the bill that "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges," which qualified liability was "conceded by the carriers" to exempt the consignor from the payment of freight and all other lawful charges.

In 1921 the Interstate Commerce Commission (*In the Matter of Bills of Lading*, 64 I.C.C. 357, 364, Appendix D) revised the prescribed form of the uniform domestic

straight bill of lading so that Section 7 was approved to read as follows:

> "Except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

The western carriers objected (p. 360) to the language in Section 7 "relieving consignor from liability for freight charges." The Commission overruled this objection and made no change in the exemption of the consignor from liability for the payment of freight and all other lawful charges, if the consignor so stipulated in the manner prescribed by Section 7.

In 1922 the language of Section 7 was again modified by the Commission (*In the Matter of Bills of Lading*, 66 I.C.C. 63, 64) so as to make the first sentence read:

> The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where

it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid.

The remainder of Section 7 contained the same language prescribed by the Commission in 1919.

The carriers urged this modification in order to eliminate doubt as to the liability of the consignee for charges accruing on shipments consigned and stated in part (p. 64) the following reasons:

1. It is well-settled law that a consignee accepting delivery of a shipment becomes liable for the charges lawfully accruing thereon.

2. The carrier could not contract with the consignee to relieve the latter of this liability.

3. The bills of lading heretofore in use have carried the provision that the consignee shall be liable for charges, and its omission might render it difficult for carriers to collect their lawful charges.

4. The provision making the consignee liable for charges was not objected to at the hearings, but was agreed upon by all parties.

5. There is no evidence which would warrant the Commission in striking out the provision in the bills now in use.

6. There is no conflict between the proposed modification and the provision of Section 3 of the interstate commerce act.

Although the Interstate Commerce Commission has recognized that a carrier may relieve a consignor from liability for the payment of freight and all other lawful charges if the consignor so stipulates on the face of the bill

of lading (*In the Matter of Bills of Lading*, 52 I.C.C. 671, 721), the Commission also has recognized that the carrier may not contract with the consignee to relieve him from this liability.

The statement: "Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges" was contained in Section 7 during all of these deliberations by the Interstate Commerce Commission. The statement, however, played no part whatsoever in the reasoning of the Commission with respect to the exemption from *liability* for the payment of "the freight and all other lawful charges" by the consignor if the consignor so stipulated, by signature, on the face of the bill of lading.

That the consignor may exempt itself from liability for the payment of freight and all other lawful charges was recognized by this Court in the case of *L. & N. R.R.* v. *Central Iron Co.*, 265 U.S. 59, wherein Mr. Justice Brandeis, writing the opinion for the Court, stated in the footnote on page 66, in part:

> "This ruling, which was adopted May 1, 1911, and 'interpreted' May 4, 1918, was amended, on March 6, 1922, by calling attention to the provision inserted in the Uniform Domestic Bill of Lading prescribed October 21, 1921. By that provision the consignor may (see Section 7 of Conditions and clause on face of bill) relieve himself of all liability for freight charges. *In the Matter of Bills of Lading*, 52 I.C.C. 671, 721; 64 I.C.C. 347, *ibid*, 357; 66 I.C.C. 63."

The petitioner does not contend that the "no recourse" clause on prepaid shipments (or on shipments not prepaid) exempts the consignor from all liability. The language of the clause and of Section 7 clearly provide otherwise. The exemption of the consignor from liability

for payment of the freight and all other charges is a limited exemption. It applies only when the delivering carrier has made *delivery* of the shipment without having received payment of the freight and all other lawful charges. Before delivery, the exemption does not apply. The carrier then has all of its rights against the consignor which it would have had if the "no recourse" clause had not been executed. In the case at bar, however, delivery had been made by the respondent without the payment of freight, contrary to the stipulation on the face of each bill, and, therefore, the "no recourse" clause applies.

B.

The mere placing of the words "To be Prepaid" on the face of each bill of lading by the consignor does not make a contract for the consignor to pay "all lawful charges," if the consignor signs the "no recourse" clause and the carrier makes delivery of the shipment, contrary to the stipulation on the face of the bill of lading.

The law is well settled that a consignee cannot accept delivery without incurring liability for the carrier's charges, known or unknown, or discovered subsequent to delivery, whether those charges were supposed to have been prepaid or otherwise, and whether they were demanded at the time of delivery or later. (*Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577.) Nevertheless, in the absence of a covering tariff provision, delivery of goods for shipment does not necessarily import an obligation of the consignor to pay the freight charges, and the carrier and the consignor are free to contract as to when and by whom payment shall be made. (*Louisville & Nashville R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59.)

In the case at bar, the carrier and the consignor did contract by whom payment of the freight and all other lawful charges shall be made. They contracted also that the consignor shall not be liable for the charges in the event that the carrier made delivery of the shipments to the consignee without the payment of freight and all other lawful charges.

The respondent claims (Brief, pp. 5, 7, 8) that the consignor expressly contracted to pay *all of the freight charges* on each of the shipments in question. This the petitioner denies. The petitioner merely promised to pay *the amount* which each bill in the case at bar recited on its face: "Freight rate—Prepaid 28¢ per 100# to Baltimore." (R. 13).

"To be Prepaid" was inserted by the consignor in the space therefor at the time of making of each bill of lading (R. 13). It does not follow, however, as respondent concludes, that "petitioner expressly contracted to prepay the freight charges." Petitioner merely promised to prepay "28¢ per 100# to Baltimore" and, by the execution of the "no recourse" clause, exempted itself from liability as to any other charges.

Although the carrier had the "right" to require prepayment or guarantee of the charges, one question is whether the carrier properly exercised it in this case. In any event, and assuming that this "right" was exercised, qualifying this "right" of the carrier, is the "right" of the consignor by Section 7 and the "no recourse" clause on the face of the bill to exempt itself from *liability* for the freight and all other lawful charges if the carrier makes delivery of the shipment.

It is clear that the consignor exercised that "right". It signed the stipulation on the face of each bill of lading that "The carrier shall not make delivery of this shipment

without payment of freight and all other lawful charges." (R. 13).

The issue is whether the consignor, after delivery of the shipment, has an exemption from *liability* for the payment of freight and all other lawful charges. The "right" of the carrier to require "prepayment or guarantee of the charges" is not in issue because the carrier did not exercise that right in such manner as to overcome the clear and unequivocal language of the "no recourse" provision, that is, in such manner as to impose liability on the consignor apart from the bills, by the provisions of a guaranty or surety bond.

The mere placing of the words "To be Prepaid" on the face of each bill of lading by the consignor does not amount to a promise to pay more than "Freight rate—Prepaid 28¢ per 100# to Baltimore" (*Chicago Great Western R. R. Co. v. Hopkins, et al.*, 48 F. Supp. 60, 62), nor does it create *liability* on the part of the consignor to pay lawful charges discovered to be due *after delivery*. When the carrier made delivery and thereby surrendered its lien upon each shipment, then each delivery was made "to the consignee without recourse on the consignor."

Under ordinary circumstances, the recitation of the freight rate on the face of the bill of lading and the prepayment thereof by the consignor satisfies the "right" of the carrier to require prepayment or guarantee of the charges. The very purpose of the "no recourse" clause in bills of lading is to protect the consignor, *after delivery*, against liability for all unforeseeable lawful charges, even those which may not be discovered by the carrier until after delivery. If, however, *after delivery* of prepaid shipments under "no recourse" bills, the carrier desires to have the liability of the consignor, in addition to that of the consignee, to protect itself against unusual situations (for example, erroneous application of the tariff due to the

method in which the consignee handled the shipment after delivery, as in the case at bar, demurrage charges unknown to the carrier at the time of the delivery, reconsignment charges accruing at the direction of the consignee unknown to the carrier at the time of the delivery, insolvency or bankruptcy of the consignee unknown to the carrier at the time of the delivery, switching charges directed by the consignee and not computed by the carrier at the time of the delivery, and refrigeration charges directed by the consignee and not computed by the carrier at the time of the delivery), the carrier may exercise its "right" of prepayment or guarantee by requiring from the consignor some form of guaranty or a surety bond guaranteeing the payment of all lawful charges. This the carrier did not do in the case at bar.

Guaranty or surety bonds filed by consignors on prepaid shipments have been filed with carriers. General Order No. 25, issued by the Director General of Railroads, among other things (*Ex Parte* No. 73, 57 I. C. C. 591, 593, June 4, 1920) provided:

> "Effective July 1, 1918 [subsequently changed to August 1, 1918], the collection of transportation charges, by carriers under Federal control, for services rendered, shall be on a cash basis, and, effective as of that date, credit accommodations then in existence which may be in conflict with the following regulations shall be cancelled.
>
> "In cases where the enforcement of this rule, with respect to freight, will retard prompt forwarding or delivery of the freight or the prompt release of equipment or station facilities, carriers will be permitted to extend credit for a period of not exceeding forty-eight (48) hours after receipt for shipment of a consignment if it be prepaid, or after delivery at destination if it be a collect consignment, provided the con-

signor if it be a prepaid consignment, or the consignee if it be collect, file a surety bond either individual or corporate, in an amount satisfactory to the Treasurer of the carrier."

The fact that after delivery, Section 7 and the "no recourse" clause exempt the consignor from liability for the payment of freight and all other lawful charges, clearly indicates an expressed intention of the parties that exemption from liability shall prevail, notwithstanding the fact that the carrier has the right to demand prepayment or guarantee of its charges. But the mere "right" to demand prepayment or guarantee does not make a "contract" with the consignor to pay the carrier "all lawful charges," even though the bills are marked "To Be Prepaid," if the carrier *makes delivery* of the shipment without payment of the "lawful charges," contrary to the stipulation on the face of the bill of lading.

The decision of the Appellate Court in the case at bar was not rendered on rehearing in response to a petition based upon the decision in *Chicago Great Western Railway Co.* v. *Hopkins, et al.*, 48 F. Supp. 60, as stated by respondent on pages 11 and 15 of its brief. The order of the Appellate Court granting rehearing was entered September 18, 1942 (R. 36). The *Hopkins* case was decided November 10, 1942.

The decision of the *Hopkins* case is contrary to the decision of the Appellate Court. The petitioner contends that the *Hopkins* case was correctly decided. The District Court (p. 61) stated:

> "It is clear that the shipper may, by contract with the carrier, absolve himself from any liability for freight charges, whether such charges are those which are initially computed or by way of an undercharge, sub-

ject to the rule which prohibits discrimination. That is, the law is satisfied if someone is made liable for the freight charges, and if the consignee is made solely responsible therefor under the contract, the law is not contravened. *Louisville & Nashville R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900; *In the Matter of Transportation of Company Material*, 22 I. C. C. 439; *In the Matter of Bills of Lading*, 52 I. C. C. 671-721; *New York Central R. Co.* v. *Trans-Amer. Petr. Corp.*, 7 Cir., 108 F. 2d 994, 129 A. L. R. 206; *New York Central R. Co.* v. *Little-Jones Coal Co.*, D. C., 25 F. Supp. 337; *Lowden* v. *Iroquois Coal Co.*, D. C., 18 F. Supp. 923.

"Upon delivery to, and acceptance by, the consignee of a shipment under a 'no recourse clause' in the bill of lading the carrier agrees to look to the consignee for any and all charges remaining unpaid and the consignee in accepting such shipment carried in pursuance of such bill of lading, agrees to pay any and all lawful charges."

The Court (p. 62) further stated:

"It is common knowledge that undercharges frequently arise in freight transportation by reason of many conditions and circumstances. It does not appear from the stipulated facts whether the defendants were the owners of the freight which was shipped. In any event, they agreed to prepay the freight in accordance with the computation noted on the bill of lading. Presumably, both parties assumed that such prepayment was a payment of all lawful charges. But at the same time the defendant consignors stipulated with the carrier that the delivery to the consignee would be without recourse on them. In other words, it is fair to assume that the parties intended that any lawful charges in addition to those paid must be collected from the consignee if delivery was accepted by such con-

signee under the contract which the consignor and the carrier had entered into. This interpretation of the agreement between the parties seems eminently fair and reasonable. Certainly, the situation herein will not warrant a finding that the parties indulged in a futile and aimless thing when they entered into the 'no recourse clause.' It is reasonable to believe that they did so for some purpose, and the purpose as herein indicated and construed is entirely consistent and compatible with the prepayment of the freight charges as computed by the parties. This construction squares not only with the apparent intent of the parties, but does not violate the rights of the consignee. The latter, upon receipt of the freight, was informed that there would be no recourse on the consignor for any freight charges or other lawful charges in addition to that which had been paid. The consignee therefore accepted the shipment with knowledge that he alone must respond for any deficiency in the freight charges. *Pittsburgh, C., C. & St. L. Ry. Co. v. Fink, supra.* [250 U. S. 577.] It is my opinion, therefore, that the 'no recourse' contract entered into between the consignors and the carrier discharges the consignors from any claim of undercharges after the shipment has been received and accepted by the consignee under the uniform bill of lading as executed herein."

Both the opinion of the Appellate Court (R. 53, 54) and the brief of the respondent (pp. 12, 13) place emphasis on that provision in the stipulation of facts which stated that at the time of making each shipment the Elgin, Joliet and Eastern Railway Company *demanded* freight thereon in the amount set forth under the heading "amounts paid by defendant" in Exhibit "A" (R. 15, 3), and that the consignor prepaid said amounts as required by the bills of lading (R. 15). These provisions in the stipulation of facts mean merely that the "Freight rate—Prepaid at 28¢

per 100# to Baltimore" (R. 13) was *payable on demand* of the initial carrier and, when billed for payment, was prepaid by the consignor. No *innuendo* should be attached to the facts stipulated that the initial carrier "demanded freight". No legal consequences result from such facts.

The Appellate Court in its opinion (R. 53, 54) construes this demand to mean "The initial carrier insisted on the payment of the charges." This statement is not correct. The initial carrier merely insisted upon payment of the amount of 28¢ per 100#.

The argument of the respondent (brief p. 8) and the opinion of the Appellate Court (R. 51) that the "no recourse" clause applies only to "collect" shipments finds no support in the history of Section 7 before the Interstate Commerce Commission. Furthermore, it finds no support from the language of Section 7, the "no recourse" clause itself or any other statement in the bills of lading.

The case of *Chesapeake & Ohio Ry. Co.* v. *Glogora Coal Co.*, 113 W. Va. 796, 169 S. E. 471, cited by respondent on page 18 of its brief is not in point because the tariff applicable to the shipments in that case expressly provided that freight charges be prepaid.

The case of *New York Central R. Co.* v. *Union Oil Co.*, 53 F. 2d 1066, is not in point because "the consignor was also consignee." As heretofore stated, the carrier may not contract with the consignee to relieve the consignee from liability for freight charges.

C.

The respondent knew or should have known that it was not making deliveries required by the export tariff under which the consignor directed the prepaid shipments to be made. The responsibility of the carrier moving an export shipment is a continuing responsibility imposing a duty upon the carrier to know the provisions of the export tariff for the purpose of obtaining compliance therewith and requiring proof of exportation.

The respondent argues (brief p. 10) and the Appellate Court agrees (R. 55) that the carrier could not be expected to foresee that additional charges would become payable because of the consignee's handling of the shipments contrary to the tariff requirements as to the application of the export rate.

Again, the respondent's brief on page 19 states that there is no foundation for the argument that respondent knew or should have known at the time of deliveries that the export rate was not applicable. The petitioner contends

(1) That the same set of facts which resulted in notice to the carrier so as to render the export rate inapplicable should have been known to the carrier within a reasonable time after August 1929, the date of the first delivery (R. 3).

(2) That the responsibility of a delivering carrier to assure itself that the export rate is applicable to a particular shipment is a *continuing responsibility*, especially when the carrier has notice it is a prepaid "no recourse" shipment.

(3) That it is the duty of the delivering carrier under all export tariffs to know what the export tariffs provide, in order that the carrier might assure itself that the export rate and not the domestic rate was applicable to the shipment.

(4) That the delivering carrier should require proof of exportation, and compliance with the export tariff, and

(5) That if the prepaid shipments move under "no recourse" bills and the delivering carrier discovers after deliveries extending over a period of years that the export rate was not applicable, the consignor is not liable for the balance of the charges due.

D.

Part prepayment of the charges to the initial carrier rendered effective the "no recourse" clause and, after delivery, protected the consignor from liability for the balance of the charges.

The entire argument of the respondent and the opinion of the Appellate Court are based upon the premise that "To be Prepaid" inserted by the consignor on the face of the bill makes a contract to prepay *all of the lawful charges*. In point B, we argued that this premise is untenable because the consignor promised to prepay only the freight in accordance with the computation on the face of the bill. That amount was prepaid by the consignor.

Each bill served "both as a receipt and as a contract." (*Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company*, 265 U. S. 59, 67). Insofar as each bill was a "receipt," signed by the agent of the initial carrier (R. 13), it was a receipt for prepayment of *part* of the charges.

The Appellate Court stated (R. 54):

> "In a case where the railroad company accepted part payment of the charges and the shipper signed the 'no recourse' stipulation, we are of the opinion that this stipulation would be effective to protect the shipper as to the balance of the charges."

The same conclusion was made in *Chicago Great Western Ry. Co.* v. *Hopkins, et al.*, 48 F. Supp. 60, 62.

The prepayment of freight—28¢ per 100# to Baltimore—was in fact a part payment of all of the charges. This part prepayment, even under the decision of the Appellate Court, renders the "no recourse" clause applicable and protects the consignor from liability.

CONCLUSION.

The judgment of the Appellate Court in the case at bar should be reversed. This Court should effectuate the expressed intentions of carriers, shippers and the Interstate Commerce Commission when Section 7 and the "no recourse" clause were first prescribed by the Commission by finding that prepaid "no recourse" shipments protect the consignor from liability for all lawful charges when the carrier, contrary to the stipulation on the face of the bill of lading, makes delivery to the consignee without payment of the charges.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1090

ILLINOIS STEEL COMPANY,

Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE E. HAMILTON,
Counsel for Respondent.

FRANCIS R. CROSS,
E. W. LADEMANN,
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THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

	PAGE
Opinion of the Court below	1
Summary and short statement of the matter involved.	1, 2
Reason why writ should not be granted	2
Points and Authorities	2
Argument	3
Petition presents no grounds for the granting of the writ and should be denied	3-12
Conclusion	12

Table of Cases.

Atlantic Coast Line Ry. Co. v. Bristol Steel & Iron Co., 30 Fed. Supp. 726 ..... 2, 10

Chesapeake & Ohio R. R. Co. v. Glogora Coal Co., 169 S. E. 417, (Certiorari denied by U. S. Supreme Court, 290 U. S. 698) 2, 9

Chicago Great Western Ry. Co. v. Hopkins, et al., 48 Fed. Supp. 60 ..... 2, 3

Davis v. Keystone Steel & Wire Co., 317 Ill. 280 ..... 2, 10

L. & N. R. R. Co. v. Central Iron & Coal Co., 265 U. S. 59 ..... 2, 3, 4, 7, 8

New York Central R. R. Co. v. Union Oil Co., 53 Fed. (2nd) 1066 ..... 2, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1090.

ILLINOIS STEEL COMPANY,

Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Appellate Court of Illinois, First District, is reported in 316 Illinois Appellate, 516, and in 46 Northeastern Reporter 2nd, 144.

II.

Summary and Short Statement of the Matter Involved.

This was an action at law brought by respondent to recover of petitioner a balance of freight charges due on a number of shipments of sulphate of ammonia made by petitioner as consignor from its plant at Gary, Indiana, to the Wholesale Phosphate & Acid Works, Inc., at Baltimore, Md., as consignee, for export. The carriers, upon being advised that the said shipments were for export, demanded payment of their charges in advance on the basis of the

export rate, and had no notice or knowledge that said shipments after delivery to the consignee would be so handled as to make inapplicable the export rate and make applicable the higher domestic rate. Petitioner prepaid the charges on the said shipments at the export rate and also signed the "no recourse" clause of each bill of lading. The Appellate Court of Illinois found that the "no recourse" clause was not applicable to the said shipments and that respondent is entitled to recover the difference between the domestic rate and the export rate on the shipments delivered within three years prior to the institution of the suit.

III.

Reason Why the Writ Should Not Be Granted.

The decision of the Appellate Court of Illinois in the case at bar is in accord with applicable decisions of this Court.

IV.

Points and Authorities.

The signing by petitioner of the "no recourse" clause of the bill of lading did not bar respondent's right to demand payment of its proper lawful tariff charges from petitioner.

L. & N. R. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59.

Chesapeake & Ohio R. R. Co. v. *Glogora Coal Co.*, 169 S. E. 417 (Certiorari denied by U. S. Supreme Court, 290 U. S. 698).

New York Central R. R. Co. v. *Union Oil Co.*, 53 Federal (2nd) 1066.

Atlantic Coast Line Ry. Co. v. *Bristol Steel & Iron Co.*, 30 Federal Sup. 726.

Davis v. *Keystone Steel & Wire Co.*, 317 Illinois 280.

Chicago Great Western Ry. Co. v. *Hopkins, et al.*, 48 Fed. Supp. 60.

V.

Argument.

The Petition Presents No Grounds for the Granting of the Writ and Should Be Denied.

Petitioner bases its petition upon the assertion that "the rule announced by Appellate Court in the case at bar conflicts with the decisions of the Court in *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 66, and of the Federal District Court in the case of *Chicago Great Western Ry. Co.* v. *Hopkins, et al.*, 48 Fed. Sup. 60."

We respectfully submit that there is no foundation for petitioner's assertion. On the contrary, the opinion rendered in the case at bar shows on its face that the Appellate Court was guided by the decisions of this Court in arriving at its conclusion that petitioner is liable for the charges which respondent is here seeking to recover. Thus, the Appellate Court states (R. 58-62):

> "Section 7 of the Conditions of the Bills of Lading provides that the consignor 'shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges, and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges.' Further along in Section 7 appears the following: 'Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges.' It is clear that in the bill of lading the carrier reserves the right to demand prepayment of its charges. Having this right, it follows that the shipper is obligated to pay such charges where the demand is made. Each bill of lading carried the provision signed by the shipper that 'the carrier shall

not make delivery of this shipment without payment of freight or all other lawful charges.' It is evident that the language 'nothing herein shall limit the right of the carrier to require at time of shipping the prepayment or guarantee of the charges,' limits the right of the shipper in the exercise of the privilege granted by the 'no recourse' clause. It is obvious that if nothing shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges, the 'no recourse' clause could not be construed as giving the shipper the right to deprive the carrier of its charges. In the *Central Iron Company* case the Supreme Court pointed out that the carrier was at liberty to require prepayment of the freight charges. Our inquiry then should be directed to ascertaining whether the carrier did exercise its right to require at the time of each shipment the prepayment of the charges. It will be observed that each of the bills of lading contains the following: 'If charges are to be prepaid, write or stamp here "To Be prepaid."' The words 'To Be Prepaid' were inserted by the defendant in the space provided at the time of making each bill of lading. The parties stipulated that at the time of making each shipment the initial carrier demanded the freight thereon in the amount set forth under the heading: 'Amounts paid by defendant' in Exhibit 'A' of the amended complaint, and that the defendant prepaid said amounts to the initial carrier as required by the bill of lading, and that the initial carrier transported each of the shipments to Curtis, Indiana and there delivered each of the shipments to the plaintiff. The stipulation further provides that 'the total freight charges at the export rate on the shipments delivered within three years prior to the institution of this suit was $9,801.93, which charges the defendant prepaid on said shipments; that the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52.' This sum of $3,675.52 is the difference between the export rate and the domestic rate. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who has assumed an obliga-

tion to pay the charges. The initial carrier insisted on the payment of the charges. This carrier did not demand payment of part of the charges. It did not demand payment of charges on account. The initial carrier could not demand payment of the domestic rate until it appeared that the shipments would not take the export rate. Each bill of lading recited that the merchandise was 'for export,' and that the freight rate was prepaid at 28¢ per 100 pounds to Baltimore. The parties knew that this was the export rate. It is plain that the initial carrier was demanding and the shipper was prepaying the charges, and that each understood that the export rate was applicable. Following the direction of the bill of lading that 'if the charges are to be prepaid, write or stamp here "To Be Prepaid,"' the words 'To Be Prepaid' were inserted by the defendant in the space provided at the time of making each such shipment. We are satisfied that when the initial carrier demands that the charges be prepaid, which it has a clear right to do, that the 'no recourse' clause is not applicable. Defendant points out that the shipper has the right to prepay any part or all of the charges if he wishes, and that it is a common practice for the consignor to prepay part of the charges and for the carrier to collect the remainder of the charges from the consignee. Nevertheless, the carrier can insist upon its right to require prepayment of its charges. Where a carrier accepts part payment of its charges from the consignor, that, of course, would not be a prepayment. At most it would be a prepayment of part of the charges. In a case where the railroad company accepted part payment of the charges and the shipper signed the 'no recourse' stipulation, we are of the opinion that this stipulation would be effective to protect the shipper as to the balance of the charges. In such a situation it is manifest that the carrier would not be demanding prepayment of its charges. It would be a contradiction to say that the railroad company insisted on the charges being prepaid and that the shipper could not be required to pay any deficiency if the proper charges were not collected. When a shipper is required to prepay

the charges, that means he is to pay all of the charges applicable to the merchandise being moved. The initial carrier required defendant to prepay the charges. In our opinion the charges which defendant agreed to pay were whatever charges were applicable to the commodity. We are of the opinion that the 'no recourse' clause is not applicable to the situation covered by the stipulation.

While it is true that the commodity shipped was Sulphate of Ammonia and that Sulphate of Ammonia was shipped, the export rate was applied on the assumption that the handling of each shipment would be in accordance with the tariff regulation. Plaintiff had no control over the handling of each shipment after it was delivered to the consignee at Baltimore. Defendant, in selling its product, had the opportunity to contract with the purchaser so as to protect itself by requiring that each shipment be handled so that the export rate would be applicable. Defendant states that it prepaid the charges on the shipment at the export rate and that it had no way of knowing what might happen to the shipment after delivery at Baltimore. Plaintiff points out that if the defendant did not know what the consignee might do with the shipment, how was it (plaintiff) to know? The shipping instructions from the defendant directed that delivery be made to the Wholesale Phosphate & Acid Works, Curtis Bay, Baltimore, Maryland, for export. These instructions were carried out and delivery made as directed. There were no additional charges due up to the time of delivery. We agree with the plaintiff that it would be unreasonable to expect that plaintiff should have anticipated that the consignee might not comply with the export tariff and should have withheld delivery, although the freight charges had been paid. Plaintiff required the payment of its charges at the time of shipment. At the time the defendant designated the shipments as for export and defendant prepaid the charges at the export rate. A subsequent examination as to the handling of the shipments revealed that the export rate was not applicable. A fundamental error in defendant's reasoning is that it fails to appreciate

that the carrier has the right to insist upon the prepayment or guarantee of the charges, for by the express terms of Section 7 of the Conditions of the Bills of Lading, nothing therein 'shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges.' Where the carrier manifests an intention to demand prepayment of the charges, the signing of the 'no recourse' stipulation by the shipper is ineffective. Defendant suggests that if it had been the intention of the framers of the Uniform Bill of Lading to make the 'no recourse' clause inapplicable to shipments marked 'To Be Prepaid,' they would have expressly provided in Section 7 that the 'no recourse' clause should not apply in cases where the prepaid clause of the bill of lading has been executed. Defendant insists that both the 'prepaid' and 'no recourse' clauses can be given effect and that the court should construe the bill of lading contract so as to give effect to all of its provisions. The law requires a shipper to pay all of the charges in advance if demand therefor is made by the carrier. Delivery of the shipment does not change the primary obligation of the shipper to pay the charges. Where the carrier insists on prepayment of the charges the shipper cannot by signing the 'no recourse' stipulation, avoid its obligation to pay all of the charges, and if through some mistake all of the charges are not collected in advance, the liability of the shipper to pay persists."

There is, therefore, no justification for petitioner's assertion that the opinion of the Appellate Court conflicts with the opinion of this Court in *L. & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59. On the contrary, the Appellate Court expressly recognized and applied the holdings in the *Central Iron Company case* that "The carrier was at liberty to require prepayment of freight charges (66)" and "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate

to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges (65)."

The decision of the Appellate Court is also in harmony with the decision of the District Court for the Western District of Pennsylvania in the case of *New York Cent. R. Co.* v. *Union Oil Co.*, 53 Fed. (2d) 1066. For the very question presented here was there considered and the court held that the shipper of a prepaid shipment was not relieved from liability for the excess of the legal rate over the amount collected by his having signed the "no recourse" stipulation of Section 7 of the bill of lading. Thus the Court stated at page 1067:

"* * * The questions are as follows:

"1. Where a carrier furnishes a consignor with a written rate quotation which is less than the published tariff rate, and on the basis of such quotation accepts and delivers to the consignee a prepaid shipment under a bill of lading which provides by signed stipulation that there shall be no recourse on the consignor if delivery is made without collecting from the consignee all freight and lawful charges, may the carrier, who through error has failed to collect the undercharge from the consignee, compel the consignor to pay the difference between the rate prepaid and the published tariff rate?

* * * * *

"Our answer to each question is in the affirmative, in so far as the questions apply to the facts of the instant case. The consignor was the owner of the goods shipped and the transportation ordered was on its own behalf. Under such circumstances, the consignor is primarily liable even where the bill of lading contains a provision imposing liability upon the consignee. *Louisville & N. R. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900. * * *

"In the instant case no doubt can exist, we think, as to the liability of the shipper. As to eight of the shipments, it is plain that the consignor, by the bill of lading, contracted to pay the freight charges." * * *

To the same effect is the decision in *Chesapeake & Ohio Ry. Co.* v. *Glogora Coal Co.*, 169 S. E. 417 (certiorari denied by U. S. Supreme Court, 290 U. S. 698), where the Court likewise held that the execution of the stipulation under Section 7 of the bill of lading does not relieve the shipper or consignor of liability for the payment of the proper freight charges on prepay shipments. In disposing of the contention of the Coal Company that it had executed the "no recourse" clause of Section 7 of the bill of lading and consequently could not be held liable for any freight charges, the Court held:

> "* * * we are of opinion that in determining whether there was primary obligation upon the consignor to pay the freight, controlling effect must be given to the above mentioned requirement of the published tariff that freight charges on shipments to a nonagency station should be prepaid.
>
> "To the suggestion of the consignor that the requirement of the tariff for prepayment of freight is indefinite and does not place any greater liability on the consignor than it does on the consignee for such prepayment, the reply seems obvious that the party who procures the services of a carrier to transport freight to a prepay station does so on the basis of statutory requirements. The primary obligation logically rests upon him who procures the service to be performed, especially where it does not appear that he was procuring the service for and on behalf of some other person. No contract entered into at the time of shipment can alter requirements of the law."

The courts have uniformly held that it is the duty of the carrier to collect its lawful charges and "the terms of every contract of shipment, so far as the service to be rendered and the compensation to be received are concerned, are fixed by the schedule filed with and approved by the Interstate Commerce Commission. No agreement of the parties can modify these terms, though expressed in writing and actually performed. The collection by the

carrier of less than the schedule rate, though expressly agreed on, will not prevent the recovery of the shortage from the schedule rate. The rates defined by the tariff cannot be varied or enlarged by either contract or tort by the carrier." *Davis* v. *Keystone Steel & Wire Co.*, 317 Ill. 280; *A. C. L.* v. *Bristol Steel & Iron Works*, 30 Federal Supp. 726.

The decision of the Appellate Court in the case at bar is, therefore, in accord with the decisions of this Court and of other courts, both state and federal.

Petitioner, at page 12 of its petition under Paragraph B, argues that the place where the carrier delivered the shipments in issue made the export tariff inapplicable and that it knew or should have known that it was not making the deliveries required by the export tariff. This argument disregards the established fact that a carrier is required to make delivery in accordance with the instructions of the bills of lading; it has no control over the actions of the consignee. There is nothing in the tariff which would require the carrier to withhold delivery merely because it might anticipate that the consignee would not meet the requirements of the export tariff. The Stipulation of Facts recited (R. 17) that the bills of lading specified the following:

> "Consigned to Standard Wholesale Phosphate & Acid Works, Inc. Destination—Curtis Bay—Baltimore, State of Maryland. Route—E. J. & E., Curtis, B&O—for export."

The carrier was required to follow these shipping directions; it had no power or right to withhold this shipment in anticipation that the consignee might not export the shipments or handle them in accordance with the export tariff. Its directions were to deliver to Standard Wholesale Phosphate & Acid Works, Inc., Curtis Bay, Baltimore, Maryland. These directions were followed. The fact that the shipments were delivered at buildings used by consignee for storing, mixing and bagging commodities mov-

ing in both domestic and export commerce does not afford any warrant for petitioner's claim that the railroad was charged with knowledge that the domestic rate would be applicable. For the Stipulation of Facts expressly provides (R. 16) that the buildings in question "branch onto or abut wharves at which steamers are berthed for receiving and discharging cargoes" and finally that the shipments were actually loaded into steamers alongside these wharves. The instructions to deliver at the buildings, therefore indicated at least as forcibly that the consignee intended to handle the shipments directly through the buildings, across the wharves and into the steamers berthed thereat. Indeed, that would be the natural and proper assumption from the fact that the shipments were billed for export and storing, bagging and mixing were not authorized under the tariffs naming export rates.

Petitioner, on page 13 of its petition, under paragraph C, states: "There was prepayment of part of the charges on each shipment made. Each bill of lading (R. 18) contained the following statement *signed by the initial carrier* (italics ours):

'Received $..... to apply in prepayment of the charges on the property described hereon.

.....
Agent of Cashier.

Per.....
(The signature here acknowledges only the amount prepaid.)'"

Petitioner's assertion that the foregoing receipt was "signed by the initial carrier" is not in accord with the facts. For the Stipulation (R. 14-21) does not recite that the receipt was signed by the initial carrier or by any other carrier. On the contrary, it clearly appears that the receipt was not signed by anyone. However, Petitioner's

contention that there was only prepayment of "part" of the charges on each shipment was properly dismissed by the Appellate Court with this statement (R. 59-60):

> "The initial carrier insisted on the payment of the charges. This carrier did not demand payment of part of the charges. It did not demand payment of charges on account."

Conclusion.

We submit that there is no conflict between the decision of the Appellate Court of Illinois in the case at bar and the decisions of this Court and that the decision of the Appellate Court is based on both the law and the facts in the case. The petition should, therefore, be denied.

Respectfully submitted,

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Counsel for Respondent.

FRANCIS R. CROSS,
E. W. LADEMANN,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 99

ILLINOIS STEEL COMPANY, *Petitioner*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF FOR RESPONDENT.

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SUBJECT INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. The carrier can require that the freight charges be prepaid by the shipper or consignor	6
II. Since the amount of the freight charges payable on a shipment is fixed by law, an undertaking to prepay the freight charges is an undertaking to pay whatever freight charges are legally payable on the shipment	7
III. By stipulating in each bill of lading that the freight charges on the shipment were to be prepaid, petitioner contracted to pay whatever freight charges were legally applicable on the shipment and the fact that petitioner also signed the so-called "no recourse" clause in the bill of lading is not a bar to recovery by respondent from petitioner	8
(a) There is no foundation for petitioner's suggestion that respondent knew, or should have known, at the time of delivery that the consignee would handle the shipments in a way which would make the export rate inapplicable	19
CONCLUSION	21

Table of Cases Cited

PAGE

Chesapeake & Ohio Ry. Co. *vs.* Glogora Coal Co., 113 W. Va. 796; 290 U. S. 658 18

Chicago Great Western Railway Co. *vs.* Hopkins et al., 48 F. Supp. 60 ..... 11, 15, 17

In the Matter of Bills of Lading, 52 I. C. C. 671 6

Judicial Code, Sections 237(b) and 240(a) (28 U. S. C. A. 344, 350) 1

Louisville & Nashville Railroad Company *vs.* Central Iron & Coal Company, 265 U. S. 59 ..... 6, 7, 18

New York Cent. R. Co. *vs.* Union Oil Company, 53 Fed.(2) 1066 17

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BRIEF FOR RESPONDENT.

OPINION BELOW.

The unanimous opinion of the Appellate Court of Illinois, First District, is reported at 316 Ill. App. 516; 46 N. E. 2d 144.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner under Sections 237(b) and 240(a) of the Judicial Code, as amended (28 U. S. C. A. 344, 350).

QUESTION PRESENTED.

In a suit by a carrier against a shipper (consignor) to collect a balance of freight charges, where the shipper (consignor) stipulated on the bill of lading issued at the

time the shipment was received by the carrier that the freight charges on the shipment were to be prepaid by him and where he prepaid the freight charges then applicable, is the carrier barred from recovering additional freight charges from the shipper (consignor) by the fact that the shipper (consignor) also signed the so-called "no recourse" provision on the bill of lading, which reads:

> "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
>
> "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)"

STATEMENT OF THE CASE.

This case was tried upon a stipulation of facts (R. 11-16) and is an action at law brought by respondent (railroad) to recover of petitioner (shipper) a balance of freight charges due on a number of shipments of sulphate of ammonia delivered by petitioner as shipper and consignor to the Elgin, Joliet and Eastern Railway at Gary, Indiana, consigned to the Standard Wholesale Phosphate & Acid Works, Inc., at Baltimore, Maryland, and transported by that railroad and by respondent. The shipments involved here were made under uniform straight bills of lading in the form prescribed by the Interstate Commerce Commission (R. 11-13).

On each of the bills of lading issued upon the shipments petitioner declared that the shipment was for export and that the freight charges thereon were to be prepaid, and petitioner prepaid to the Elgin, Joliet and Eastern Railway the freight charges on each shipment from Gary to Baltimore at the export rate (R. 13, 15). At the time the shipments moved, and also today, there were two freight rates applicable to the shipment of sulphate of ammonia from Gary to Baltimore, dependent upon whether

the shipment was for export or for domestic use. The rate on a shipment for export was and is lower than the rate on a shipment for domestic use (R. 12).

When the shipments arrived at Baltimore they were delivered by respondent to the designated consignee at the destination specified in the bills of lading. However, after delivery had been made and the shipments had passed beyond respondent's control, the consignee handled each shipment in a manner which violated the tariff requirement as to the application of the export rate. Respondent thereupon demanded that petitioner pay the domestic rate on the said shipments (R. 15-16). Upon petitioner's refusal to pay, this suit was brought for the difference between the total freight charges on the said shipments at the domestic rate and the total freight charges prepaid by the petitioner on the shipments at the export rate.

In the stipulation entered into between respondent and petitioner it is agreed that the determination of this suit shall turn upon the effect of certain instructions incorporated by petitioner into each bill of lading contract (R. 16).

One of the instructions in question appeared in the following provision which was contained in each of the bills of lading under which these shipments moved:

> "If charges are to be prepaid, write or stamp here 'To be Prepaid'."

The words "To be Prepaid" were inserted by petitioner in the space provided at the time of the making of each bill of lading contract and the charges on each shipment were prepaid by petitioner to the Elgin, Joliet & Eastern Railway at the export rate (R. 13).

Each of the bills of lading had this further provision which was signed by petitioner (R. 13):

> "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
>
> "The carrier shall not make delivery of this ship-

ment without payment of freight and all other lawful charges. (See Section 7 of Conditions.)"

Section 7 of the conditions of the bill of lading, in so far as that section is here relevant, is as follows (R. 14):

> "Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. * * * Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. * * *

The only question in this case is whether the provisions of Section 7 release petitioner (consignor) from liability for the additional freight charges admittedly due on the said shipments in the face of petitioner's express undertaking as to each shipment that the lawful freight charges thereon were to be prepaid by petitioner.

In the stipulation entered into between respondent and petitioner it is agreed that if the Court shall find that Section 7 of the conditions of the bill of lading is not a bar to recovery by respondent from petitioner, then respondent is entitled to recover the sum of $3,675.52, being the amount due on the shipments delivered to the consignee within three years prior to the institution of this suit; and that if the Court shall find that Section 7 of the conditions of the bill of lading is a bar to recovery by respondent from petitioner, then respondent is not entitled to recover (R. 16).

SUMMARY OF ARGUMENT.

Petitioner expressly contracted to prepay the freight charges on each of the shipments involved here. Since the amount of the freight charges payable on a shipment is fixed by law, petitioner's contract for prepayment was a contract to pay whatever freight charges were legally payable on the shipment. The freight charges legally payable on the shipments involved here were charges computed upon the basis of the domestic rate from Gary to Baltimore and the fact that petitioner invoked as to each shipment the "no recourse" provisions of Section 7 of the bill of lading is no bar to the recovery from petitioner of the balance between such charges and the charges prepaid, since the "no recourse" provisions of that section are not applicable when the shipper has contracted to prepay the freight charges on a shipment.

ARGUMENT.

There is no dispute as to the rate legally applicable to the shipments in question or as to the correctness of the amount which respondent seeks to recover. For the parties have stipulated that the shipments were subject to the domestic rate from Gary to Baltimore and that the amount sued for correctly states the difference between the charges calculated at the domestic rate and the charges prepaid at the export rate. And it is further stipulated that this amount is due respondent. Petitioner's sole defense to the suit is the fact that, although it expressly contracted to prepay the freight charges on each shipment, it at the same time invoked the "no recourse" provisions of Section 7 of the bill of lading (R. 16).

Before considering petitioner's defense we will briefly review certain established principles which run counter to it.

I. THE CARRIER CAN REQUIRE THAT THE FREIGHT CHARGES BE PREPAID BY THE SHIPPER OR CONSIGNOR.

While the Interstate Commerce Act requires a carrier to collect the full amount of the freight charges, the Act is not concerned with who makes the payment and leaves the carrier free to enter into any contract it may see fit with reference thereto, so long as no unlawful discrimination results. Ordinarily, the shipper or consignor, having ordered the transportation, is primarily liable for the freight charges and the carrier has the right to make the liability absolute by requiring that the charges be prepaid. As the Commission said in the case entitled *In the Matter of Bills of Lading*, 52 I. C. C. 671, 721:

> "A primary right of the carrier in the conduct of its business is that of reasonable compensation for the service rendered by it, and it is entitled to assure itself of such compensation by demanding it in advance."

The matter of liability for freight charges is fully covered in *Louisville & Nashville Railroad Company* vs. *Central Iron & Coal Company*, 265 U. S. 59, where Mr. Justice BRANDEIS, speaking for the Court, said (66, 67):

> "* * * As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination. The carrier was at liberty to require prepayment of freight charges, or to permit that payment to be deferred until the goods reached the end of the transportation. *Wadley Southern R. Co.* vs. *Georgia*, 235 U. S. 651, 656. Where payment is to be deferred, the carrier may require that it be made before delivery of the goods, or concurrently with the delivery, or may permit it to be made later. * * *
>
> "To ascertain what contract was entered into we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract."

Looking to the bills of lading covering the shipments involved here, we find that in each instance petitioner expressly contracted to prepay the freight charges (R. 13).

II. SINCE THE AMOUNT OF THE FREIGHT CHARGES PAYABLE ON A SHIPMENT IS FIXED BY LAW, AN UNDERTAKING TO PREPAY THE FREIGHT CHARGES IS AN UNDERTAKING TO PAY WHATEVER FREIGHT CHARGES ARE LEGALLY PAYABLE ON THE SHIPMENT.

The courts have uniformly held that it is the duty of the carrier to collect its lawful charges and that the amount of those charges is determined by applying to each shipment the rates and regulations applicable thereto, as stated in the tariff filed by the carrier with the Interstate Commerce Commission. These principles are summarized in the *Central Iron case, supra*, where Mr. Justice BRANDEIS said (65):

> "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus they were fixed by law. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges."

Consequently, wherever the bill of lading contract refers to the carrier's "charges" the term embraces all the freight charges applicable on the shipment under the filed tariffs; and when the shipper or consignor contracts to pay the carrier's "charges," as petitioner did in the instant case, the contract is to pay whatever freight charges are legally payable on the shipment. The stipulation of facts provides here that the freight charges payable on the shipments involved are the charges on which this suit is based; namely, charges computed upon the domestic rate from Gary to Baltimore (R. 16).

In this connection the Appellate Court held (R. 54):

> "* * * When a shipper is required to prepay the charges, that means he is to pay all of the charges applicable to the merchandise being moved. The initial carrier required defendant to prepay the charges. In our opinion the charges which defendant agreed to pay were whatever charges were applicable to the commodity."

III. BY STIPULATING IN EACH BILL OF LADING THAT THE FREIGHT CHARGES ON THE SHIPMENT WERE TO BE PREPAID, PETITIONER CONTRACTED TO PAY WHATEVER FREIGHT CHARGES WERE LEGALLY APPLICABLE ON THE SHIPMENT AND THE FACT THAT PETITIONER ALSO SIGNED THE SO-CALLED "NO RECOURSE" CLAUSE IN THE BILL OF LADING IS NOT A BAR TO RECOVERY BY RESPONDENT FROM PETITIONER.

We have heretofore shown that petitioner expressly contracted to prepay the freight charges on each shipment and that each such contract was an undertaking by petitioner to pay whatever freight charges were legally payable on the shipment. And we have further shown that the only defense interposed by petitioner to this suit for the balance between the charges legally payable on the shipments and the charges computed at the export rate is the fact that petitioner invoked as to each shipment the "no recourse" provisions of Section 7 of the bill of lading.

Briefly stated, respondent's answer is that the "no recourse" provisions of Section 7 are not applicable in instances where, as here, the shipper expressly contracted to prepay the carriers' charges, and that the said provisions relate only to "collect" shipments where the bill of lading contract defers payment of the freight charges until the goods have reached the end of the transportation.

The pertinent portion of Section 7 of the bill of lading reads:

> "Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accru-

> ing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. * * * Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. * * * ."

We respectfully submit that the wording of Section 7 requires the conclusion that the "no recourse" provisions therein do not apply to prepaid shipments. Thus, the second sentence in the section provides that "The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges." The fact that these provisions are necessarily repugnant to an undertaking by the shipper to prepay whatever charges are payable is aptly shown by the Appellate Court in its decision, on rehearing, in the present case (R. 55):

> "There were no additional charges due up to the time of delivery. We agree with the plaintiff (respondent) that it would be unreasonable to expect that plaintiff should have anticipated that the consignee would not comply with the export tariff and should have withheld delivery, although the freight charges had been paid."

The court's conclusion is plainly correct. For if the "consignor shall be liable for the freight and all other lawful charges" and he expressly contracts to prepay the freight and all other lawful charges, what possible application can the "no recourse" clause have to such a transaction? How, if the freight and all other lawful charges have been prepaid by the shipper, could the carrier satisfy the provision that it "shall not make delivery without requiring payment of such charges?" The charges having been prepaid, the consignee can demand that delivery be made without more ado. Certainly the carrier could not be expected to forsee that additional charges would become payable because of the consignee's handling of the shipments in a manner contrary to the tariff requirement as to the application of the export rate. When petitioner did not know what the consignee would do with the shipments, how was respondent to know?

Further confirming our position that the "no recourse" clause has no application to prepaid shipments. Section 7 concludes with this provision:

> "* * * Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges."

This assertion of the carriers' acknowledged right is clear and precise, but the provision becomes meaningless if the shipper could limit that right by invoking the "no recourse" provisions of the section. Manifestly any such construction would override the declared intent of Section 7 and the Appellate Court properly so held, saying (R. 53):

> "* * * It is evident that the language 'nothing herein shall limit the right of the carrier to require at time of shipping the prepayment or guarantee of the charges,' limits the right of the shipper in the exercise of the privilege granted by the 'no recourse' clause. It is obvious that if nothing shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges, the 'no recourse'

clause could not be construed as giving the shipper the right to deprive the carrier of its charges."

We will not prolong this discussion of the effect of the provisions of the section since the court below considered that issue fully and with great care. This is apparent from the two opinions delivered herein (R. 22-35, 38-56), the case having been reheard (R. 37) in response to a petition based by the instant petitioner upon the decision in *Chicago Great Western Railway Co.* vs. *Hopkins et al.*, 48 F. Supp. 60, which is the case on which petitioner again relies. In both of the opinions below of Mr. Justice BURKE, in which Justices HEBEL and KILEY concurred, the court holds that the "no recourse" provisions in the bill of lading are not applicable to the shipments involved here for the reason that the shipper had expressly contracted as to each shipment to pay whatever charges were payable thereon. Thus, the court said on rehearing (R. 52-54):

> "Section 7 of the Conditions of the Bills of Lading provides that the consignor 'shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges, and if the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges.' Further along in Section 7 appears the following: 'Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges.'. It is clear that in the bill of lading the carrier reserves the right to demand prepayment of its charges. Having this right, it follows that the shipper is obligated to pay such charges where the demand is made. Each bill of lading carried the provision signed by the shipper that 'the carrier shall not make delivery of this shipment without payment of freight or all other lawful charges.' It is evident that the language 'noth-

ing herein shall limit the right of the carrier to require at time of shipping the prepayment or guarantee of the charges,' limits the right of the shipper in the exercise of the privilege granted by the 'no recourse' clause. It is obvious that if nothing shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges, the 'no recourse' clause could not be construed as giving the shipper the right to deprive the carrier of its charges. In the *Central Iron Company* case the Supreme Court pointed out that the carrier was at liberty to require prepayment of the freight charges. Our inquiry then should be directed to ascertaining whether the carrier did exercise its right to require at the time of each shipment the prepayment of the charges. It will be observed that each of the bills of lading contains the following: 'If charges are to be prepaid, write or stamp here "To Be Prepaid."' The words 'To Be Prepaid' were inserted by the defendant in the space provided at the time of making each bill of lading. The parties stipulated that at the time of making each shipment the initial carrier demanded the freight thereon in the amount set forth under the heading: 'Amounts paid by defendant' in Exhibit 'A' of the amended complaint, and that the defendant prepaid said amounts to the initial carrier as required by the bill of lading, and that the initial carrier transported each of the shipments to Curtis, Indiana, and there delivered each of the shipments to the plaintiff. The stipulation further provides that 'the total freight charges at the export rate on the shipments delivered within three years prior to the institution of this suit was $9,801.93, which charges the defendant prepaid on said shipments; that the total freight charges on said shipments at the domestic rate was $13,477.45, a difference of $3,675.52.' This sum of $3,675.52 is the difference between the export rate and the domestic rate. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who has assumed an obligation to pay the charges. The initial carrier insisted on the payment of the charges. This carrier did not demand

payment of part of the charges. It did not demand payment of charges on account. The initial carrier could not demand payment of the domestic rate until it appeared that the shipments would not take the export rate. Each bill of lading recited that the merchandise was 'for export,' and that the freight rate was prepaid at 28¢ per 100 pounds to Baltimore. The parties knew that this was the export rate. It is plain that the initial carrier was demanding and the shipper was prepaying the charges, and that each understood that the export rate was applicable. Following the direction of the bill of lading that 'if the charges are to be prepaid, write or stamp here "To Be Prepaid,"' the words 'To Be Prepaid' were inserted by the defendant in the space provided at the time of making each such shipment.

"We are satisfied that when the initial carrier demands that the charges be prepaid, which it has a clear right to do, that the 'no recourse' clause is not applicable. Defendant points out that the shipper has the right to prepay any part or all of the charges if he wishes, and that it is a common practice for the consignor to prepay part of the charges and for the carrier to collect the remainder of the charges from the consignee. Nevertheless, the carrier can insist upon its right to require prepayment of its charges. Where a carrier accepts part payment of its charges from the consignor, that, of course, would not be a prepayment. At most it would be a prepayment of part of the charges. In a case where the railroad company accepted part payment of the charges and the shipper signed the 'no recourse' stipulation, we are of the opinion that this stipulation would be effective to protect the shipper as to the balance of the charges. In such a situation it is manifest that the carrier would not be demanding prepayment of its charges. It would be a contradiction to say that the railroad company insisted on the charges being prepaid and that the shipper could not be required to pay any deficiency if the proper charges were not collected. When a shipper is required to prepay the charges, that means he is to pay all of the charges applicable to the merchandise being moved. The initial

carrier required defendant to prepay the charges. In our opinion the charges which defendant agreed to pay were whatever charges were applicable to the commodity. We are of the opinion that the 'no recourse' clause is not applicable to the situation covered by the stipulation."

And further (R. 55-56):

"While it is true that the commodity shipped was Sulphate of Ammonia and that Sulphate of Ammonia was shipped, the export rate was applied on the assumption that the handling of each shipment would be in accordance with the tariff regulation. Plaintiff had no control over the handling of each shipment after it was delivered to the consignee at Baltimore. Defendant, in selling its product, had the opportunity to contract with the purchaser so as to protect itself by requiring that each shipment be handled so that the export rate would be applicable. Defendant states that it prepaid the charges on the shipment at the export rate and that it had no way of knowing what might happen to the shipment after delivery at Baltimore. Plaintiff points out that if the defendant did not know what the consignee might do with the shipment, how was it (plaintiff) to know? The shipping instructions from the defendant directed that delivery be made to the Wholesale Phosphate & Acid Works, Curtis Bay, Baltimore, Maryland, for export. These instructions were carried out and delivery made as directed. There were no additional charges due up to the time of delivery. We agree with the plaintiff that it would be unreasonable to expect that plaintiff should have anticipated that the consignee might not comply with the export tariff and should have withheld delivery, although the freight charges had been paid. Plaintiff required the payment of its charges at the time of shipment. At that time the defendant designated the shipments as for export and defendant prepaid the charges at the export rate. A subsequent examination as to the handling of the shipments revealed that the export rate was not applicable.

A fundamental error in defendant's reasoning is that it fails to appreciate that the carrier has the right to insist upon the prepayment or guarantee of the charges, for by the express terms of Section 7 of the Conditions of the Bills of Lading, nothing therein 'shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges.'

"Where the carrier manifests an intention to demand prepayment of the charges the signing of the 'no recourse' stipulation by the shipper is ineffective. Defendant suggests that if it had been the intention of the framers of the Uniform Bill of Lading to make the 'no recourse' clause inapplicable to shipments marked 'To Be Prepaid,' they would have expressly provided in Section 7 that the 'no recourse' clause should not apply in cases where the prepaid clause of the bill of lading has been executed. Defendant insists that both the 'prepaid' and 'no recourse' clauses can be given effect and that the court should construe the bill of lading contract so as to give effect to all of its provisions. The law requires a shipper to pay all of the charges in advance if demand therefor is made by the carrier. Delivery of the shipment does not change the primary obligation of the shipper to pay the charges. Where the carrier insists on prepayment of the charges the shipper cannot, by signing the 'no recourse' stipulation, avoid its obligation to pay all of the charges, and if through some mistake all of the charges are not collected in advance, the liability of the shipper to pay persists. Counsel for the defendant submitted to us a copy of the opinion filed November 10, 1942, in the United States District Court for the District of Minnesota, Fourth Division, in the case of *Chicago Great Western Railway Co.* vs. *Hopkins et al.*, No. 497 Civil. While this opinion is in point on the issues before us, we do not agree with the reasoning or the result."

As we have said, the decision on rehearing in the instant case was rendered after the opinion in the *Chicago Great Western* case had been carefully considered by the court below in response to the petition filed by the instant peti-

tioner. The court states that it does not agree with the reasoning or the result in the *Chicago Great Western case* and we respectfully submit that this conclusion is fully warranted. For Judge NORDBYE there reasons (48 F. Supp. 60, 61) that Section 7 of the terms and conditions of the bill of lading is not pertinent to the determination of the effect of a stipulation on the bill of lading, even though the stipulation was expressly made subject to those terms and conditions and commenced with the words "subject to Section 7 of Conditions." And, applying this reasoning, the opinion completely ignores the provision in Section 7 that "nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges."

The opinion continues (62):

> "Presumably, a consignor could arrange with a carrier to pay part of the freight charges, and then by signing the 'no recourse' proviso secure exemption from the balance or any additional lawful charges. In fact, this arrangement is tacitly recognized by the form of receipt which will be found on the face of the uniform bill of lading, which reads as follows:
>
> 'Received $..... to apply in prepayment of charges on the property described hereon.
>
> .....
> Agent or Cashier
>
> 'Per .....
>
> '(The signature here acknowledges only the amount prepaid).'"

Although this receipt and the part-payment arrangement recognized by it are separate and apart from the proviso in the bill of lading as to the prepayment of freight charges, the opinion reads the part-payment arrangement into the prepayment proviso and thereby reduces the shipper's undertaking from an express agreement to prepay the

lawful charges on the shipment to an agreement to pay a certain amount to be applied against the charges.

In its petition for writ of certiorari petitioner seeks to lay the foundation for the same line of reasoning in the instant case. For petitioner there asserts (13) that there was prepayment of *part* of the charges on each of the shipments involved here and that each bill of lading contained the above-quoted receipt *signed by the initial carrier.* However, these assertions are not in accord with the facts. For the stipulation of facts (R. 11-16) does not recite that the receipt was signed by the initial carrier or by any other carrier. On the contrary, it clearly appears (R. 14) that the receipt was not signed by anyone. As to petitioner's assertion that there was only prepayment of "part" of the charges on each shipment, the Appellate Court correctly found (R. 53-54):

> "The initial carrier insisted on the payment of the charges. This carrier did not demand payment of part of the charges. It did not demand payment of charges on account."

Finally, the holding in the *Chicago Great Western* case is contrary to the holding of the District Court for the Western District of Pennsylvania in the case of *New York Cent. R. Co.* vs. *Union Oil Company*, 53 Fed. (2d) 1066. For the very same question was considered there and the court held, as did the Appellate Court in the present case, that the shipper of a prepay shipment was not relieved from liability for the excess of the legal freight charges over the amount collected by his having signed the "no recourse" stipulation of Section 7 of the bill of lading, saying (1067):

> "* * * The questions are as follows:
>
> "1. Where a carrier furnishes a consignor with a written rate quotation which is less than the published tariff rate, and on the basis of such quotation accepts and delivers to the consignee a prepaid shipment under a bill of lading which provides by signed stipulation that there shall be no recourse on the consignor if

delivery is made without collecting from the consignee all freight and lawful charges, may the carrier, who through error has failed to collect the undercharge from the consignee, compel the consignor to pay the difference between the rate prepaid and the published tariff rate?

* * * * * * *

"Our answer to each question is in the affirmative, in so far as the questions apply to the facts of the instant case. The consignor was the owner of the goods shipped and the transportation ordered was on its own behalf. Under such circumstances, the consignor is primarily liable even where the bill of lading contains a provision imposing liability upon the consignee. *Louisville & N. R. R. Co.* vs. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900. * * *

"In the instant case no doubt can exist, we think, as to the liability of the shipper. As to eight of the shipments, it is plain that the consignor, by the bill of lading, contracted to pay the freight charges." * * *

To the same effect is the decision in *Chesapeake & Ohio Ry. Co.* vs. *Glogora Coal Co.*, 113 W. Va. 796 (certiorari denied by U. S. Supreme Court, 290 U. S. 658), where the court likewise held that the execution of the stipulation under Section 7 of the bill of lading does not relieve the shipper or consignor of liability for the payment of the proper freight charges on prepay shipments. In disposing of the contention of the Coal Company that it had executed the "no recourse" clause of Section 7 of the bill of lading and consequently could not be held liable for any freight charges, the court held (799):

"* * * we are of opinion that in determining whether there was primary obligation upon the consignor to pay the freight, controlling effect must be given to the above mentioned requirement of the published tariff that freight charges on shipments to a nonagency station should be prepaid.

"To the suggestion of the consignor that the require-

ment of the tariff for prepayment of freight is indefinite and does not place any greater liability on the consignor than it does on the consignee for such prepayment, the reply seems obvious that the party who procures the services of a carrier to transport freight to a prepay station does so on the basis of statutory requirements. The primary obligation logically rests upon him who procures the service to be performed, especially where it does not appear that he was procuring the service for and on behalf of some other person. No contract entered into at the time of shipment can alter requirements of the law."

We therefore submit that the decision of the Appellate Court in the case at bar is correct and accords with the principles applied by this Court and by other courts, both state and federal.

(a) There is No Foundation for Petitioner's Suggestion that Respondent Knew, or Should Have Known, at the Time of Delivery that the Consignee Would Handle the Shipments in a Way Which Would Make the Export Rate Inapplicable.

At page 12 of its petition for writ of certiorari, petitioner argues that the place where respondent delivered the shipments in issue made the export tariff inapplicable and that respondent knew or should have known that it was not making the deliveries required by the export tariff. This argument disregards the established fact that a carrier is required to make delivery in accordance with the instructions of the bills of lading; it has no control over the actions of the consignee. On the shipments in question the bills of lading specified (R. 43):

"Consigned to Standard Wholesale Phosphate & Acid Works, Inc. Destination—Curtis Bay—Baltimore, State of Maryland. Route—E. J. & E., Curtis, B&O—for export."

Respondent was required to follow these shipping direc-

tions; it had no power or right to withhold the shipments in anticipation that the consignee might not handle them in accordance with the export tariff. Its directions were to deliver to Standard Wholesale Phosphate & Acid Works, Inc., Curtis Bay, Baltimore, Maryland. These directions were followed. The fact that the shipments were delivered at buildings used by consignee for storing, mixing and bagging commodities moving in both domestic and export commerce does not afford any warrant for petitioner's claim that the railroad was charged with knowledge that the domestic rate would be applicable. For the stipulation of facts expressly provides (R. 12-13) that the buildings in question "branch onto or abut wharves at which steamers are berthed for receiving and discharging cargoes" and finally that the shipments were actually loaded into steamers alongside these wharves. The instructions to deliver at the buildings therefore indicated, at least as forcibly, that the consignee intended to handle the shipments directly through the buildings, across the wharves and into the steamers berthed thereat. Indeed, such would be the natural and proper assumption from the fact that the shipments were billed for export and storing, bagging and mixing were not authorized under the tariffs naming the export rate.

As the court below said (R. 55):

> "* * * There were no additional charges due up to the time of delivery. We agree with the plaintiff (respondent) that it would be unreasonable to expect that plaintiff should have anticipated that the consignee would not comply with the export tariff and should have withheld delivery, although the freight charges had been paid."

CONCLUSION.

It is submitted that petitioner, having contracted to prepay the freight charges legally payable on the shipments involved, is liable to respondent for the balance of freight charges admittedly due and that the "no recourse" provisions of the bill of lading, invoked by petitioner, have no application here and are not a bar to recovery. We therefore submit that the judgment of the Appellate Court of Illinois in this case should be affirmed.

Respectfully submitted,

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p. 6.

SUPREME COURT OF THE UNITED STATES.

No. 99.—October Term, 1943.

Illinois Steel Company, Petitioner, *vs.* Baltimore and Ohio Railroad Company. } On Writ of Certiorari to the Appellate Court of the State of Illinois, First District.

[January 3, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Decision in this case turns on the proper interpretation to be given to several clauses of the uniform bill of lading approved by the Interstate Commerce Commission as authorized by §§ 1(6), 12 and 15(1) of the Interstate Commerce Act, as amended, 49 U. S. C. §§ 1(6), 12, 15(1), which make it the duty of interstate rail carriers to adopt and observe the form and substance of bills of lading approved by the Commission. *Matter of Bills of Lading*, 52 I. C. C. 671, 685, 686; 64 I. C. C. 347, 351-352; 64 I. C. C. 357; 66 I. C. C. 63; 167 I. C. C. 214; 172 I. C. C. 362; 245 I. C. C. 527.

Petitioner was the consignor upon through bills of lading of a number of rail shipments of sulphate of ammonia for export. The shipments were from Gary, Indiana to Baltimore, Maryland over the lines of connecting railroads, of which respondent was the terminal carrier. Each bill of lading[1] contained a clause, inserted by petitioner, the consignor, in conformity to instructions appearing on the bill, and providing that freight was "to be prepaid"; and also the so-called non-recourse clause which petitioner signed and which read: "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions.)"[2]

[1] Specimen forms of the uniform bills of lading, prescribed for interstate rail shipments during the period when the shipments concerned in this action were made, may be found in Consolidated Freight Classification No. 7 (1932) pp. 52-56.

[2] § 7 of the conditions of the bill of lading, so far as relevant, is set out at pages 3-4, *infra*. The parties have stipulated that the non-recourse clause contained in the bills of lading in this case were in the form quoted in the text. The form approved by the Commission varies slightly in details immaterial here. See Consolidated Freight Classification No. 7, *supra*, p. 52.

Petitioner at shipment paid the freight charges specified in the bills of lading, which were computed at the export freight rate. The bills of lading included a receipt for specified sums paid to the carrier "to apply in prepayment of the charges". The record does not disclose who was the owner of the sulphate, or what further relations existed between consignor and consignee.

The parties concede that upon delivery of the shipments at Baltimore, the consignee did not handle the sulphate as required by the provisions of the export tariff, and that the delivery or the method of handling subjected the shipments to the higher domestic freight rate. The parties have also stipulated that respondent is entitled to recover from petitioner, additional freight charges to the extent of the difference between the export rate and the higher domestic rate, unless recovery is barred by the clauses of the bills of lading to which we have referred.

Respondent brought the present suit in the Illinois Superior Court to recover the additional freight due upon the shipments. The Superior Court gave judgment for petitioner, which the Illinois Appellate Court reversed, 316 Ill. App. 516, and the Illinois Supreme Court denied leave to appeal. We granted certiorari, 320 U. S. —, the interpretation of the uniform bill of lading in the circumstances of this case being a question of public importance.

Pursuant to Congressional authority, the Interstate Commerce Commission has prescribed uniform forms of bills of lading, including that involved in this case. *Matter of Bills of Lading, supra.* In promulgating them, the Commission has stated that it was doing so in the interest of uniformity and to prevent discriminations. 52 I. C. C. 671, 676-677, 678; 64 I. C. C. 357, 363, 364. It has found that the prescribed forms are just and reasonable, 52 I. C. C. 671, 740, and that any other would be unreasonable, 64 I. C. C. 357, 360-361, 364.

The construction of the clauses of a bill of lading, adopted by the Commission and prescribed by Congress for interstate rail shipments, presents a federal question. *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 194-195; *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 212-213. Such has been the consistent ruling of this Court where the question presented concerned the conditions in bills of lading affecting the liability of the carrier such as are required by the Carmack Amendment, as amended, 49 U. S. C. § 20(11). *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling*

Co., supra; Atchison, Topeka & S. F. Ry. Co. v. *Harold*, 241 U. S. 371; *St. Louis, Iron Mt. & S. Ry. Co.* v. *Starbird*, 243 U. S. 592; *Gulf, Colo. & S. F. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 34; *American Ry. Exp. Co.* v. *Lindenburg*, 260 U. S. 584; *Chesapeake & Ohio Ry. Co.* v. *Martin, supra;* cf. *Peyton* v. *Railway Express Agency*, 316 U. S. 350.

Since the clauses of the uniform bill of lading govern the rights of the parties to an interstate shipment and are prescribed by Congress and the Commission in the exercise of the commerce power, they have the force of federal law and questions as to their meaning arise under the laws and Constitution of the United States. Hence we have jurisdiction to review their determination by the state courts, in a suit by the carrier to recover freight charges. Judicial Code § 237(b), 28 U. S. C. § 344(b); *Pittsburgh, Cinc., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, 581-583; *New York Central & H. R. R. Co.* v. *York & Whitney Co.*, 256 U. S. 406, 408; cf. *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176-177; *Peyton* v. *Railway Express Agency, supra; Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, 639-640.

The shipments by petitioner being in interstate commerce, the rail freight rates are those stated in the tariffs filed with the Interstate Commerce Commission. They cannot be lawfully released by the carrier or altered by others who have assumed the duty to pay them. See *Mid State Horticultural Co., Inc.* v. *Pennsylvania R. R. Co.*, No. 40, decided November 22, 1943; *Pittsburgh, Cinc., C. & St. L. Ry. Co.* v. *Fink, supra*, 581-583. The tariffs do not prescribe who is to pay the freight charges, but subject to the prohibition against unlawful discrimination and the limitations imposed by the uniform bill of lading, the parties to the shipment, as between themselves, are free to stipulate who shall pay them. See *Louisville & N. R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 65-67.

Section 7 of the conditions of the uniform bill of lading provides that the owner or consignee shall pay the freight and all other lawful charges upon the transported property, and except in those instances where it may be lawfully authorized to do so, that no railroad carrier shall deliver or relinquish, at destination, possession of the property covered by the bill of lading until all tariff rates and charges have been paid. Cf. § 3(2) of the Interstate Commerce Act, as amended, 49 U. S. C. § 3(2). But it further provides that "The consignor shall be liable for the freight and all

other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided[3]) shall not be liable for such charges. . . . Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. . . ."

Under these provisions, if the non-recourse clause is not signed by the consignor, he remains liable to the carrier for all lawful charges. The carrier is free to demand payment in advance by the consignor, or it may decline to make delivery to the consignee until the freight charges are paid or guaranteed, or if delivery is made to the consignee without payment, the consignee is also liable for all freight charges. But if the non-recourse clause is signed by the consignor and no provision is made for prepayment of freight, delivery of the shipment to the consignee relieves the consignor of liability, see *Louisville & N. R. R. Co.* v. *Central Iron Co.*, *supra*, 66, n. 3, and acceptance of the delivery establishes the liability of the consignee to pay all freight charges. *Pittsburgh, Cinc., C. & St. L. Ry. Co.* v. *Fink*, *supra*; *New York Central & H. R. R. Co.* v. *York & Whitney Co.*, *supra*.

In the light of these long established rules of liability the facts of the present case raise only a single question, whether the stipulation in the bills of lading for the prepayment of freight restricts the operation of the non-recourse clause so that, despite its presence in the bills of lading, recourse may be had to petitioner for charges in addition to those which it prepaid at shipment, the additional charges arising only by reason of events which occurred on or after the delivery of the shipments to the consignee.

The Illinois Appellate Court thought, and respondent argues here, that this liability was imposed on the consignor only because

[3] The exception, inapplicable here, is in the case where a consignee, other than the consignor, is an agent with no beneficial title in the goods, and has notified the carrier of these facts. In such a case the consignee is not "liable for transportation charges . . . (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him," but the consignor is liable for such charges. Cf. § 3(2) of the Interstate Commerce Act, as amended, 49 U. S. C. § 3(2).

the prepayment clause was so in conflict with the non-recourse clause as to nullify the latter and thus revive the obligation which, in the absence of that clause, rests on the consignor to pay all lawful charges on his shipments. The question is whether there is such a conflict as to require this result. For we must assume that both clauses were intended by the parties to have some effect, and hence, unless unavoidably in conflict, they must, so far as they reasonably may, be reconciled so that each will have some scope for operation.

The obvious purpose and effect of the non-recourse clause is to relieve the shipper from liability for freight charges, upon delivery to the consignee. Such a purpose is consistent with an intention that in case of prepayment of a portion of the freight charge, the carrier should, after delivery, look solely to the consignee for the remainder of the charge. Since, by the uniform bill of lading, the parties to a rail shipment are left free to relieve the consignor from liability by their contract, such an arrangement would be within their competence and would release the consignor from liability to the extent of the unpaid freight charges.

It could not be said that by agreeing to pay a part of the charges in advance, the consignor has agreed to pay more, or that the non-recourse clause would cease to be effective as to the unpaid charges because the consignor had paid or undertaken to pay some of them. The words of § 7 of the conditions of the bill of lading are to the effect that if the consignor stipulates that the carrier shall not deliver "without requiring payment of such charges" and the carrier makes delivery, the consignor "shall not be liable for such charges". In this context, "such charges" are the lawful charges which the consignor has not paid or stipulated to pay in advance.

We discern no policy underlying the uniform bill of lading or in the provisions of § 7 which would deny the application of the non-recourse clause where the consignor has stipulated for advance payment of some but less than all of the lawful charges. And no plausible reason is advanced why an agreement by the consignor to pay a part of the lawful charges should be deemed to deprive him of the benefit of the non-recourse clause beyond the amount he has undertaken to pay.

We think that the same considerations point here to the reconciliation of the conflict which the Illinois court thought to exist in this case. For in the present circumstances we cannot say

that the prepayment clause contemplated payment by the consignor of the additional charges demanded at the domestic tariff rate and hence we find no irreconcilable conflict between the prepayment and non-recourse clauses.

Petitioner's stipulation was that the freight charges were "to be prepaid" and the bill of lading acknowledged receipt of specified sums "to apply in prepayment of the charges". Hence the stipulation was for an obligation to be performed in advance of the transportation or at the most in advance of delivery to the consignee. This obligation could not have contemplated payment of more than all the lawful charges upon the consignor's shipment as tendered and transported in conformity to the billing. No more could prepayment be made, before either shipment or delivery, of a charge which might never be incurred, and which could be, only after the transportation was completed and delivery made to the consignee.

It is familiar experience, as in this case, that under-charges may occur which could not be subject to prepayment either because they are not lawful charges on the shipment as tendered and billed, or because they depend upon events occurring after the transportation has been completed. In either case we conclude that the reasonable construction of the prepayment clause is that, with respect to these charges, it did not, either by its design or by the intention of the parties, curtail the operation of the non-recourse clause, so as to deprive petitioner, the consignor, of the immunity from liability for which it was entitled to stipulate by the non-recourse clause. See *Chicago Great Western Ry. Co.* v. *Hopkins*, 48 Fed. Supp. 60. This construction does not leave the carrier unprotected with respect to the collection of unanticipated freight charges, for it may always insure their collection by demanding the consignor's guarantee of all charges, pursuant to § 7 of the conditions of the uniform bill of lading, a provision which presupposes that the prepayment of freight clause is not as broad as the authorized guarantee.

In the special circumstances of this case we have no occasion to consider the broader contention of petitioner that the prepayment clause contemplated an undertaking upon its part to pay only the amount of freight charges specified on the face of the bill of lading, whether or not they were computed at the lawful rate on the shipments as tendered and billed.

Reversed.

Mr. Justice Roberts concurs in the result.